THE IMPACT OF THE SUPREME COURT DECISION IN SPORHASE VERSUS NEBRASKA

HEARING

BEFORE THE

SUBCOMMITTEE ON WATER RESOURCES

OF THE

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ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

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CONTENTS

OPENING STATEMENTS

Page

Abdnor, Hon. James, U.S. Senator from the State of South Dakota 1

Baucus, Hon. Max, U.S. Senator from the State of Montana 2

WITNESSES

Bahr, Dr. Thomas, Director, Office of Water Policy, Department of the Interior 12

  Prepared statement 47

Bell, Craig, Western States Water Council, accompanied by Ray W. Rigby, chairman, Western States Water Council 25

Dinkins, Carol, Assistant Attorney General, Land and Water Division, Department of Justice 6

  Prepared statement 31

Neufeld, Warren R., Secretary, South Dakota Department of Natural Resources 20

  Prepared statement 53

Pressler, Hon. Larry, U.S Senator from the State of South Dakota 3

ADDITIONAL MATERIAL

Energy and Natural Resources, Committee on, excerpt from report of 139

Statements:

  Wallop, Hon. Malcolm, U.S. Senator from the State of Wyoming 5

  Babbitt, Hon. Bruce, Governor, State of Arizona 96

  Interstate Conference on Water Problems 148

Supreme Court decision 113

Washington Post, The, article from 145

Western States Water Council, Laws of the Twelve States Pertaining to Interstate and/or Interbasin Water Transfers 57

THE IMPACT OF THE SUPREME COURT DECISION IN SPORHASE v. NEBRASKA

WEDNESDAY, SEPTEMBER 15, 1982

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON WATER RESOURCES,
Washington, D.C.

The subcommittee met at 10 a.m., in room 4200, Dirksen Senate Office Building, Hon. James Abdnor (chairman of the subcommittee) presiding.

Present: Senators Abdnor, Domenici, Gorton, and Baucus.

Also present: Senator Pressler.

OPENING STATEMENT OF HON. JAMES ABDNOR, U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator ABDNOR. The meeting will come to order.

It is a pleasure to welcome our witnesses and our guests at this important hearing into the impact of the recent Supreme Court decision, *Sporhase* v. *Nebraska.*

This hearing is called for informational purposes. The committee has no legislation before it at this time that would affect this decision. Yet our Committee on Environment and Public Works holds the jurisdiction and responsibility for water resources under the rules of the Senate. For that reason, I believe it is important that we seek to learn as much as possible about the decision, its meaning, and its potential impact.

There is nothing more important than water to the growth of the State of South Dakota, as well as every State, particularly those in the West. Decisions affecting the manner in which water is allocated and appropriated necessarily hold great importance in the West.

And while it might be best to let this issue rest for a time, I am forced to note that S. 1844, the so-called coal slurry bill, is now on the Senate Calendar. The Energy Committee report on that legislation contains an extensive discussion on the *Sporhase* decision, and its relation to the bill.

Therefore, I believe it would prove useful if our witnesses would do what they can to further assist our committee, as well as the Senate, in providing their views on this legislative history to S. 1844, as it relates to *Sporhase.*

Thank you.

Senator Baucus.

OPENING STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Mr. Chairman, I thank you for calling today's hearing.

On July 2, 1982, the Supreme Court fired a warning shot over our heads with its decision in the case of *Sporhase* v. *Nebraska*. The decision threatens the uneasy truce between the Federal Government and the States over who will control water in the West. Indeed, one legal scholar has suggested to me that, read most broadly, *Sporhase* puts the States effectively out of the business of administering their water resources.

While *Sporhase* caught our attention, this is not an isolated example of Federal intervention into the historic domain of the States—regulation and management of water resources. The doctrine of reserved and unreserved Federal water rights, the permitting of hydropower development without regard to State water permit requirements, and the pending coal slurry legislation have collectively raised a warning flag.

This hearing is, therefore, a particularly timely and appropriate first step. As you know from your own State of South Dakota, Mr. Chairman, the issue of water allocation is deadly serious business in the semi-arid West. As a result, I believe a comprehensive legislative approach must be considered and the Committee on Environment and Public Works is a proper forum with its jurisdictional responsibility over water resources.

As I read the *Sporhase* case, we appear to be left with more questions than answers. I am hopeful that today's witnesses can help us to address some of these questions and to develop an approach which recognizes the legitimate State role in the allocation, conservation, and management of increasingly scarce water resources. In fact, the subject of controvery in the *Sporhase* case, the rapidly diminishing Ogallala Aquifer, has brought the situation into sharp focus.

One of the principal series of questions that must be examined today is the impact of *Sporhase* on the coal slurry bill recently reported by the Senate Energy and Natural Resources Committee. The report accompanying the measure speaks of the committee's recognition of the "sanctity of State water law." Nonetheless, others argue that transgressions may occur despite the authors' best intentions. By way of example, let me read from a letter written to me on September 7, 1982, by Prof. George A. Gould, of the University of Wyoming's College of Law. He stated:

> Even the *Sporhase* decision indicates that Congress can authorize the States to impose otherwise impermissible burdens on interstate commerce if it so chooses. *Sporhase* merely held that Congress had not done so. Thus, the approach of S. 1844 appears to be valid. The question is whether the language of the bill is sufficiently precise to accomplish this result.
>
> Section 5(B) is the provision which principally addresses this problem. However, I find the section somewhat inadequate. It would be more satisfactory if the section expressly stated that restrictions imposed by State law, including a complete prohibition on the export of water, are valid although these restrictions might otherwise violate the Commerce clause. Alternatively, an appropriately worded definition of State law might be incorporated in the bill to accomplish this purpose.

Given the potentially disastrous consequences if S. 1844 has not properly addressed questions such as this which have been raised by the *Sporhase* decision, the need for our thorough review of this issue is even more evident.

Beyond the coal slurry issue, I believe we also need to explore the potential impact of *Sporhase* on energy development in general in the West. We all agree that our coal reserves must be developed to bring the Nation to a greater level of energy independence. However, I am convinced that allowing our agricultural interests to be trampled in a "water rush" is shortsighted and bad policy for the Nation as a whole.

Furthermore, I hope that we can explore the *Sporhase* decision as it results to the appropriation and diversion of shared interstate water resources—particularly the most fragile of these resources, ground water aquifers. The wise management and use of this water is going to require surgical precision, not a meat-ax approach.

I look forward to today's hearing as an opportunity to initiate our work in this area. The issue is undeniably complex, but with counsel such as today's witnesses, I am confident that we can chart an appropriate course.

Senator ABDNOR. With us today is a Senator who was a member of this committee prior to this session, Senator Larry Pressler from South Dakota, who also has an extreme interest in this bill. He wanted to make an opening statement.

STATEMENT OF HON. LARRY PRESSLER, U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator PRESSLER. Mr. Chairman, I will not read my opening statement. I have to chair another hearing, but I thank you very much for holding this hearing. I am also pleased that South Dakota's secretary of water and natural resources, Bob Neufeld, is here to state South Dakota's interest and I think this is a very timely and necessary hearing. I might say that many committees in this Congress are getting involved in this area, and I hope that you maintain jurisdiction.

I guess every committee around here is talking about coal slurry pipeline and I think this is the proper place for it.

I have a statement for the record about South Dakota's interest, about South Dakota's Oahe Dam and reservoir in 1962 and about the things that my State has given up and sacrificed.

As the chairman knows, South Dakota sacrificed over 530,000 acres of land for this project and our State of South Dakota has suffered a loss of over half a million acres of prime farmland so States like Missouri, Iowa, Nebraska could obtain flood control relief, hydroelectric power, additional navigation and irrigation opportunities and increased industrial and domestic water resources.

I think we have to be very alert to the fact that South Dakota has not received Federal projects in return for some of the things that we have given up. And I think we need to fight forceably for those rights.

Also is the matter of the Madison aquifer to create revenue for water development and to provide to several South Dakota communities as well as in the East. And we have worked not only the matters related to the ETSI pipeline but also the Web pipeline. So we do have a crisis in water in our State and in the United States and this hearing will focus on *Sporhase* v. *Nebraska*, the case which came down.

I want to again thank the chairman for allowing me to appear. I apologize, we have a committee hearing that I must chair that was scheduled a year ago, that we have been trying not to have but we have to. I submit my statement and I complement the chairman and the witnesses.

Senator **ABDNOR**. Thank you.

Without objection, your entire statement will be made part of the record and we will note it with great interest. We also have a statement from Senator Wallop which will be entered into the record following yours.

[The statements of Senators Pressler and Wallop follow:]

STATEMENT OF HON. LARRY PRESSLER, U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

I understand that today's hearings will focus on the recent Supreme Court decision in the case of *Sporhase* v. *Nebraska*. I am pleased to see that the Environment and Public Works Committee is exploring the impact of this decision on the larger issue of coal slurry pipeline development. I would also like to welcome Bob Neufeld, South Dakota's secretary of water and natural resources, who will also be testifying tomorrow before the Senate Surface Transportation Subcommittee.

The Supreme Court decision of last July issued several findings which Congress must carefully consider. First of all, the Supreme Court decided that the use of groundwater is subject to the interstate commerce clause of the Constitution. As a result, any State law which prohibits the transfer of water across State lines can be construed as an unreasonable burden on interstate commerce. While the Court found that western States have demonstrated "superior competence" in conserving water resources, its decision restricts State law from prohibiting water transfers on any but the narrowest basis of conservation and preservation.

South Dakota has a particular interest in this decision because of my State's recent agreement with the Energy Transportation System Inc. (ETSI). Several years ago, ETSI initiated a proposal to construct a coal slurry pipeline from Wyoming to Louisiana. The water needs involved in this proposal are of great concern to South Dakota. The original proposal required pumping water from the Madison aquifer. This plan would have depleted the water supply for a number of cities and hundreds of ranches in South Dakota, Wyoming, and Montana. To avoid this problem and to provide revenues for South Dakota water projects, the sale of water from the Oahe reservoir on the Missouri River in central South Dakota was negotiated with ETSI. In other words, South Dakota did exactly what the Supreme Court says it has a right to do—negotiate an agreement which conserves South Dakota's western groundwater from the Madison aquifer.

The Oahe dam and reservoir, completed in 1962 was authorized and constructed under the Pick-Sloan Missouri Basin program. The purpose of this program was to provide flood control, navigation, irrigation, municipal and industrial water supplies, and electric power generation for the upper Midwest region. South Dakota sacrificed over 530,000 acres of land for this project. My home State suffered this loss of over a half-million acres of prime farmland so that States like Missouri, Iowa, and Nebraska could obtain flood control relief, hydroelectric power, additional navigation and irrigation opportunities, and increased industrial and domestic water resources. South Dakota made this sacrifice in good faith, with the promise that we would receive assistance for major irrigation projects. However, these promises have not been kept. South Dakota did not get any irrigation projects nor did we receive compensation for the precious and valuable farmland we lost. In fact, South Dakota has benefitted the least from the Pick-Sloan program. Nebraska uses 46 times as much Missouri River water for industrial purposes as South Dakota. Iowa uses 76 times more water and Missouri consumes 116 times more water for industrial use than my home State. It is obvious that some States have gained immense economic benefits at South Dakota's expense. How can our neighboring States begrudge South Dakota the legitimate use of a resource which has proven so beneficial to them?

In an effort to save the Madison aquifer, create revenue for water development and provide water to several western South Dakota communities, my State negotiated the sale of 50,000-acre-feet of water annually for 10 years. The sale of this water is a small portion of the 9 million acre-feet of water per year available for Missouri Basin States' use. In fact, the total amount of water negotiated in the ETSI agreement is only one-half of 1 percent of available water. More water evaporates annually from the Oahe reservoir than will be sold under this agreement.

Meanwhile, the revenue from this water sale will be placed in a water development fund to begin financing the water projects promised to South Dakota over 30 years ago. The ETSI project will also provide much needed water for 10 communities in the western part of my State. South Dakota has acted to protect its water resources and benefit the citizens of our western ranching communities. As Congress considers legislation in light of the Sporhase decision, I believe that South Dakota's experience can be a useful example of an individual State preserving and protecting its water rights.

Statement of Hon. Malcolm Wallop, U.S. Senator From the State of Wyoming

Earlier this year, the United States Supreme Court decided Sporhase et al, v. Nebraska ex rel Douglas, Attorney General (No. 81-613). As this Committee knows, that decision struck down a Nebraska law that regulated the out-of-state export of water. The decision in that case raises serious questions about a State's ability to control the export of its water resources, because it has now cast a cloud over the Constitutionality of all export limitations which many states have. This has sent a shock wave through the nation, but the waves were felt most in the West where the available water is already in high demand because of its scarcity.

The Court issued its opinion on July 2, 1982, but my interest in this case began long before that. As Chairman of the Energy Subcommittee on Public Lands and Reserved Water, I held hearings in my Subcommittee on June 8, focusing on the water aspects of S. 1844, "The Coal Distribution and Utilization Act of 1982," and the possible effects which the ultimate decision in *Sporhase* would have on a state's ability to regulate their water resources should S. 1844 become law. The witnesses at my hearing included many of the preeminent scholars in the field of water today Among them were the former Dean of the law school at the University of Wyoming, Frank Trelease, who is now teaching at McGeorge School of Law at the University of the Pacific; Edward Clyde, a practitioner of water law in Utah for over 40 years and has written extensively in this area; and Gary Widman, a former Associate Solicitor at the Department of the Interior, professor of water law at California's Hastings law school, and who is now with the Washington office of the law firm of Fulbright and Jawarski.

This hearing resulted in a series of amendments to S. 1844 which I authored and which were added to the bill in Committee mark-up, unanimously by voice vote. This bill was subsequently, favorably reported out of the Committee and is now pending before the Senate. Although the decision in *Sporhase* reinforced the need for the amendments, my languae is limited to water use in pipelines only. The intent of these amendments is unequivocal, however, I have been apprised by the Department of Justice that section 5 of the bill may be ambiguous. I welcome all attempts to improve upon my water amendments, but caution everyone that my intent is unwavering in the area of water use for coal slurry pipelines, I intend that the primacy of state water laws will be secured beyond question.

The important water export questions raised in Sporhase transcend political or parochial consideration that exist in many of the issues which Congress deals with each day. The questions of control of water export has particularly profound implications for Western states where scarce water supplies are lifeblood. It was in that spirit that I called a meeting on July 22 of the bipartisan Western Coalition, to begin Congressional discussion of *Sporhase,* to initiate a cooperative effort to assess its impact, and ultimately to devise a legislative scheme to cure the problems which it presents.

Since that time, my staff and I have contacted affected members of the House and Senate on both sides of the aisle, various committees, representatives from the administrative and judicial branches of government, state government, and the private sector asking them to begin a careful evaluation of *Sporhase,* to analyze the impact that they feel it will have, to articulate their concerns with the case, and to detail what action they feel will be needed to allay those concerns.

We are continuing to receive these comments on *Sporhase* from everyone who deals with water law; governors, attorneys general, law school professors and deans, corporations and private individuals. We continue to contact other organizations and persons who ultimately will be affected by any action or inaction we might take in regard to *Sporhase*.

It was my hope that this first step would serve to define the parameters and delineate the scope of a well-planned approach which will enable us to absorb the blow which *Sporhase* has dealt to a state's ability to regulate its water. These analyses will serve as a spring board for carefully scheduled; responsible hearings which have a clearly defined scope. That in turn will serve as a basis for possible legislation on *Sporhase*, which I would introduce next session.

Justice Stevens invites Congressional action to answer the questions posed by *Sporhase* when he states, in his opinion, that the decision was made "in the absence of a contrary view expressed by Congress." However, we should not view this language as an invitation to act prematurely or irresponsibly.

Remedial legislation cannot be based on a jurisdictional, political, or regional basis. The Supreme Court, in its decision in *Sporhase* v. *Nebraska* touched every American, whether we are importers of water or exporters, whether we consume fresh water or whether we dispose of waste water. Democrat or Republican, Easterner or Westerner, we have a duty, indeed an obligation, to work together to research the impact of *Sporhase*, to discuss its consequences and to draft and pass responsible legislation which will cure the mischief which *Sporhase* has wrought. It is in this spirit that today I come before your Committee, Mr. Chairman.

Senator **Abdnor**. We will begin without our regular subcommittee members who should be arriving soon. They are extremely interested in this issue.

We are looking forward to hearing from our witnesses, and I am going to ask Ms. Carol Dinkins, the Assistant Attorney General for Land and Water Division, Department of Justice, and Dr. Thomas Bahr, the Director of the Office of Water Policy for the Department of the Interior, to appear at the same time.

We welcome you to the committee. We know the extensive work you have done in research and study on this issue and we know of the great help you can give us in the direction we should consider taking.

Ms. Dinkins, I think we will start out with you.

STATEMENTS OF CAROL DINKINS, ASSISTANT ATTORNEY GENERAL, LAND AND WATER DIVISION, DEPARTMENT OF JUSTICE; AND DR. THOMAS BAHR, DIRECTOR, OFFICE OF WATER POLICY, DEPARTMENT OF THE INTERIOR

Ms. **Dinkins**. Thank you, Mr. Chairman, we appreciate your kind invitation to discuss the Supreme Court's recent decision in *Sporhase* v. *Nebraska*.

Specifically, we offer here our interpretation of the decision, and its impact, as well as some comments concerning possible legislative remedies. I will also address the approach to the *Sporhase* decision taken by S. 1844 in the context of coal slurry pipelines.

As the subcommittee is aware, the Supreme Court, in a 7-to-2 decision, declared ground water to be an article of commerce and therefore susceptible to regulation by Congress. The Court declared that the provision of a Nebraska statute which prohibits the export of water to any State that does not provide reciprocal rights violates the commerce clause of the U.S. Constitution.

The case arose when the Nebraska attorney general sued in State court to enjoin the owners of contiguous tracts of land in Nebraska and Colorado from transporting ground water across the border without a permit.

The Nebraska statute would have banned the export of water for use in Colorado because Colorado prohibits the export of water outside its borders.

The Supreme Court viewed this portion of the Nebraska law as an undue burden on interstate commerce.

The Court first held that water is an article of commerce. It specifically rejected Nebraska's argument that water is owned by the State in its sovereign capacity and, accordingly, is not an article of commerce. The Court discarded this argument as being based on the "legal fiction" of State ownership of natural resources. The Court recently repudiated in the context of other natural resources case this principle. The Court said that congressional power cannot depend on whether specific State property law asserts State ownership of water.

Rather, the Court concluded, ground water should be considered an article of commerce because of its substantial interstate dimension. The Court also answered in the affirmative on the question of whether Nebraska's restriction amounts to an undue burden on commerce.

In this *Sporhase* case the expressed purpose of the challenged Nebraska restriction was the conservation and preservation of diminishing ground water supplies. The Court agreed with Nebraska that is a legitimate and highly important governmental objective.

The Court then held that several aspects of the challenged Nebraska law, apart from the reciprocity requirement, furthered this legitimate purpose and therefore are not facially violative of the commerce clause. The Court was not concerned with the fact that the restrictions applied only to interstate transfers. The court reasoned that such heightened restrictions may usually implicate commerce clause concerns, but that they are justified in the instant context for four reasons: One, State regulation of the use of water is at the core of its police power; two, States, including Nebraska, have had a legal expectation, fostered by congressional acts and judicial decrees, that they may restrict water within their borders; three, State ownership claims may be "fictitious" but they are sufficient to support a limited preference for a State's own citizens; and four, that States have acquired additional rights for water within their borders due to their continuing conservation efforts.

Nebraska's reciprocity requirement did not, however, pass the Court's commerce clause scrutiny. First, the Court held that the restriction was "facially discriminatory" because the requirement acted as a complete ban on exporting water to Colorado. Under the Court's precedent, such a facially discriminatory restriction must have a "close-fit" with its purported purpose to remain within the strictures of the commerce clause.

The Court viewed Nebraska's reciprocity requirement as not shown to be adequately related to the purpose of conservation and preservation of ground water. The Court strongly suggested that if Nebraska had presented evidence that it was a particularly arid State requiring a rough equivalence between import and export of water, and that intrastate distribution was feasible regardless of the distance involved, the reciprocity requirement might have survived the test.

In the absence of such evidence, it could not pass constitutional muster.

Finally, the Court considered Nebraska's contention that its reciprocity requirement did not violate the commerce clause because the requirement had been authorized by Congress. It is well settled that Congress has the power to authorize the State regulation which would otherwise run afoul of the so-called negative implications of the commerce clause.

In making this aspect of its argument, Nebraska relied on several interstate compacts and on 37 Federal statutes in which Congress has deferred to the application of State water law.

The Court found this showing inadequate because although it demonstrated Congress desire to defer to State water law in a myriad of circumstances, it did not evince an intent to remove any Federal constitutional constraints on those State laws. The Court clearly stated that more of an express statement of congressional intent would be necessary for it to conclude otherwise.

Although the Supreme Court's holding on the commerce clause question appears, at first glance, to be extraordinary and unprecedented, a dispassionate reading of recent case law suggests that holding is consistent with the Court's approach to the commerce clause generally.

A line of precedent has evolved since 1942 which holds that activities within States, including purportedly "wholly local intrastate activites," may have a substantial effect on interstate commerce and are therefore within Congress commerce clause authority. This line of analysis has been reflected in cases which touch upon State water regulation.

As recently as 1979 the Court held that State claims of sovereign ownership of minnows in State waters did not immunize State regulation of the resource from commerce clause scrutiny. Therefore, the fact that the Court rejected the theory of State ownership and held that ground water as an article of interstate commerce is not an aberration, but instead, is a logical extension of existing precedent.

It follows, therefore, that the probability of the court reversing its position on this fundamental issue is quite remote.

The Court's treatment of the second issue in the case—whether the Nebraska restriction amounted to "undue burden"—is not the more enlightening and significant portion of the opinion. Despite the Court's formal rejection of the ownership theory, the Court did leave the States wide latitude to fashion statutes which regulate the use of water and which promoted conservation, even when such regulation may restrict the export of such water.

The thrust of the Court's holding is that such restrictions cannot be arbitrarily imposed; instead, such restrictions must clearly be based upon an articulated and permissible State objective, such as to promote conservation.

It is in this vein that the Court struck down Nebraska's reciprocity requirement. It did so because it found no evidence to prove that it was related to a conservation objective. The court freely offered that Nebraska might have "credibly" supported its reciprocity requirement. And the Court even suggested that a "demonstrably arid State" could "conceivably" support a total ban on exportation of water by showing a "close means-end relationship" between the ban and the objectives of the water conservation and preservation.

The clear result is that although the Court formally rejected the legal doctrine of State ownership of water, it recognized that States have sufficient interest in water use to support their regulation of waters within their borders almost as if they did own the waters. In particular, the Court allows each State to provide a preference to its own citizens and needs.

For the purpose of upholding export restrictions, the only additional requirement is that the State support their regulations in terms of legitimate government objectives. And the Court has made it clear that such a showing is quite possible.

The Court, therefore, left the States considerable constitutional latitude within which they may fashion legislation that regulates the export of water from their borders. Indeed, it is quite possible that given this *Sporhase* decision, most of the States will be able to justify their existing restrictions in terms of the legitimate governmental objectives described by the Court. The last aspect of the Court's decision—its ruling that Congress has not expressed an intention to authorize State water regulation that would otherwise violate the commerce clause clearly is correct. Even the dissent does not take issue with this portion of the majority opinion. It is apparent that the Court simply reaffirmed Congress power to regulate interstate commerce and even to modify the result of the *Sporhase* decision. In discussing Congress authority to act in this area, I am cognizant of two major concerns expressed by Western States. First, there is significant concern about the ramifications of the Court's rejection of the State ownership theory. Historically, the theory of sovereign ownership has been the foundation of many Western States' claims of plenary authority over their internal waters. The other aspect of the opinion of particular concern to the West is its impact on all other Western States with laws containing reciprocity requirements or total export bans. Several States have restrictions on their books. The validity of these statutes has been cast into great doubt by *Sporhase,* so States do have a practical concern. Should they simply try to gather evidence as suggested by the Court to support their restrictions or should they seek enactment of new more carefully worded requirements by their respective State legislatures? Some States have simply relied on their absolute power to prohibit exports and have not put into their law more finely tuned methods.

Consequently, those who wish to export water from these States are likely to take advantage of the hiatus of uncertainty now existing in the wake of *Sporhase.* If armed only with an absolute prohibition of doubtful validity, State governments will be in a weak position to regulate such proposed diversions, should any be proposed.

It should be emphasized that the first of these concerns, rejection of State ownership, and with the holding that water is an article of interstate commerce, is not a holding which Congress may overrule. The Court has not said that the Federal Government owns the water so it is not altogether clear whether it would be within Congress authority to declare the water was owned by the States. Rather, the gist of the Court's logic has been that such resources are never really owned by anyone or any entity, but that their use is regulated by the Federal and State governments.

It is also doubtful that Congress has the power to declare that something is not an article of commerce. To be sure, Congress may authorize an activity that otherwise impermissibly burdens interstate commerce, but that is a far different proposition from saying that Congress may pass a law which restricts the scope of its own affirmative authority under the clause.

In any event, this is simply a matter of semantics because even assuming that Congress could so restrict itself, Congress could also undo that restriction. The result would be the same. Following this *Sporhase* decision, it is clearly within Congress constitutional authority to regulate the use of water with a substantial effect on interstate commerce including allocation, and no subsequent act of Congress can eliminate or reject its continuing discretion to do so.

The second major concern of the Western States with the *Sporhase* case, its impact on export restrictions of Nebraska and other States—could be addressed by Congress. We conclude that it is within congressional authority to determine that export restrictions, and even total prohibition do not amount to undue burden to interstate commerce.

In the recent case of New England Power, the Supreme Court stated that it is "well settled that Congress may use its powers under the commerce clause to confer upon the States an ability to restrict the flow of interstate commerce that they otherwise do not enjoy."

In *Sporhase* the Court commented specifically on the extent of congressional authority in this regard and cited several decisions in which it had previously deferred to such congressional determinations.

The Court explicitly noted the power of the States to regulate their water dispute through interstate compacts, ratified by Congress, and thereby avoiding the strictures of the commerce clause.

Therefore, if Congress decided that it should act to accomplish a modification of this part of the Court's decision acceptable to legislative oversight, there are four basic avenues Congress could follow.

It could pass generic legislation establishing guidelines as to the types of State export restrictions which were permissible or not permissible. Second, it could simply pass a law listing all current State statutory export restrictions and authorize them pursuant to its commerce clause power. Three, Congress could address the propriety of burdens on interstate commerce created by State law in the context of narrow factual circumstances. Fourth, Congress could enact legislation designed to spur the establishment of interstate compacts on the theory that interstate compacts are the best legal avenue of the efficient and equitable resolution of interstate water disputes.

Although these and other options are open to Congress, it may be advisable for Congress to avoid enacting any across-the-board remedial legislation.

It should be emphasized that the Court leaves open the possibility that the Western States will be able to satisfy *Sporhase* simply by recasting their existing export restrictions or enacting new nearly equivalent restrictions which demonstrate a close nexus to the conservation and preservation of water.

Even more fundamentally, the mere attempt by Congress to define which types of State restrictions are proper and which are not, would amount, I think ironically, to the very type of Federal legislation which proponents of State water rights have historically opposed. And it would be no easy task to develop comprehensive guidelines defining the scope of permissible State regulations. Such an effort may lead to a result even more problematic to the States than *Sporhase.*

Finally, at the chairman's request, we have reviewed the provisions of S. 1844, the Coal Distribution and Utilization Act of 1982. The primary purpose of this bill would be to provide the Federal power of eminent domain to those interstate coal pipeline distributions systems—commonly known as "coal slurry pipelines"—that the Secretary of Energy determines are in the national interest. The administration has previously reported its views on this legislative proposal.

Briefly, the administration supports competition in the field of energy transportation and believes coal slurry pipelines should be allowed to compete. Nevertheless, the administration has not supported this bill because the need for coal slurry pipelines is not sufficiently compelling to justify usurpation of State eminent domain authority by the Federal legislation.

Thus, although I can respond to this committee's inquiry concerning the effect of S. 1844 on State water law, these comments should not be construed as departing from the administration's previously stated position on the merits of this legislation.

As I mentioned earlier, there is no question that it is within Congress commerce clause power to authorize a State law that would otherwise constitute an impermissible burden on interstate commerce. The relevant issue with regard to S. 1844 is to what degree has Congress accomplished this result in the language of the bill. As noted by the Senate Energy and Natural Resources Committee report accompanying S. 1844, Justice Stevens in *Sporhase* stated that congressional intent to authorize under the commerce clause otherwise impermissible State laws must be "expressly stated." Consequently, it is under that strict standard that one must evaluate the ultimate effect of S. 1844.

From the statutory language of S. 1844 and relevant legislative history, in particular, the Senate committee report, it is readily apparent that it was the committee's intent to allow State governments to apply their existing and future water laws, including the type of export bans or reciprocity requirements at issue in *Sporhase,* to restrict water for coal slurry pipelines without running afoul of the commerce clause. Of course, whether the courts will ultimately determine that this expressed intent is sufficiently clear to immunize those laws from commerce clause scrutiny is necessarily a matter of speculation, the resolution of which must await judicial analysis.

We do note, however, that the operative language of the bill contained in section 5 of the bill is not, standing alone, free from ambiguity. And it is only the thorough commentary provided in the committee report which makes the intent of the drafters of this provision completely clear.

On balance, however, we conclude that the courts would be likely to pay close heed to the guidance provided in the report and defer to this limited exercise of commerce clause authorization, if it were ultimately enacted by Congress.

There is also inevitably a risk involved in Congress taking any action at all of this kind. For simply by entering the field of water allocation and isolating one particular aspect of State water law for congressional authorization under the commerce clause, there is necessarily the threat that courts will read this as expressing, by negative implication, congressional disfavor for other aspects of State water law.

The committee report reveals the committee's own acute awareness of this risk and the report makes several efforts to avoid any such judicial inference. And, moreover, we agree that should any congressional action at all be appropriate in response to *Sporhase,* it should be narrowly focused, not broadly worded. Still, we must caution that there are risks inherent in this proposal, especially in its reliance on judicial acceptance of certain aspects of the accompanying legislative history. The administration will be carefully reviewing this matter at the Cabinet level and therefore is not now proposing any specific course of action. It is the administration's policy, however, that questions regarding water rights and allocation are, to the extent permitted by the Constitution, best left to the discretion and control of the States, and any recommendations we make will be developed in light of that fundamental principle.

The issues of whether Congress should act to modify the decision, and if so, how, are important questions. If not carefully crafted and narrowly tailored, congressional legislation in this area might well do more harm than good to the important goal of primacy of State water law. Therefore, we urge this subcommittee and this Congress to proceed cautiously before exercising the commerce clause authority over the allocation of water.

Thank you.

Senator ABDNOR. Thank you Ms. Dinkins for that very excellent background and research that you put into this issue, the matter. Let me say your entire statement will be placed in the record.

Ms. DINKINS. Thank you Mr. Chairman.

Senator ABDNOR. At this time we are anxiously waiting to hear from Dr. Bahr. We know you have done considerable work in this field and you may proceed as you wish, Dr. Bahr. I will say your entire statement will be made a part of the record.

STATEMENT OF THOMAS BAHR

Dr. BAHR. Thank you, Mr. Chairman, I will not read the entire statement. In this fashion, it would avoid some duplication with Ms. Dinkins and expedite the hearing.

I should say at the outset this is my first opportunity in my position as Director of the Office of Water Policy to testify before this committee and I appreciate the opportunity.

Senator ABDNOR. We welcome you.

Dr. **Bahr**. I will highlight a few items here and respond to the three questions that were directed by the chairman to the Department of the Interior.

First, a brief description of the *Sporhase* decision and its impact throughout the Nation and particularly the West. We should say at the outset that the administration is strongly committed to State primacy on water issues. While some view the *Sporhase* decision as an opening or pretext for expanded Federal presence in ground water management, we reject such counsel and will vigorously oppose efforts to intrude Federal authority into an area that should continue to be reserved to the States.

We hold that the holding of the Court to be very narrow and restricted to the unique facts presented therein. The Court after initially finding that ground water was an article of interstate commerce closely scrutinized each portion of Nebraska statute and stated that only the reciprocity provision violated the commerce clause of the U.S. Constitution.

However, the Court also held that a State has the power to regulate water to protect the health of its citizens. State boundaries have relevance in allocation of water resources and will be respected by the court. A State may show limited preference to its own citizens in the utilization of water, and last a State may favor its own citizens in time of shortage.

Finally, and perhaps of most interest to the Department and to the Congress, is the Court's response to Nebraska's argument that Congress had authorized the State to impose otherwise impermissible burdens on interstate commerce in ground water. The Court pointed out that Congress silence on ground water regulation was not sufficient to remove constitutional restraints. In other words, the Court found that Congress had not specifically preempted either State or Federal control over ground water.

Congress is, therefore, free to exercise that control in the future.

It is significant to point out, however, that the Court in reference to ground water overdraft of the Ogallala aquifer States that the multicharacter of this aquifer confirms the view that there is a significant Federal interest in conservation as well as in fair allocation of this diminishing resource. While we share the Court's conclusion that the Federal Government has the basic constitutional legislative authority to legislation in this area, this situation and similar situations elsewhere are best addressed by State governments through statute or by agreements between and among the States involved.

It is the Department's view that the impact of *Sporhase* on the Federal Government is extremely limited. If Congress fails to legislate then the status quo in the West should remain. Only the Nebraska reciprocity statute is immediately affected. No new powers are given to the Federal Government nor will they be without explicit Federal legislation preempting Federal regulation.

So, in summary, it is the Department's opinion that *Sporhase* has limited impact on the problems or policies of this Department, its impact if any would be in the future if Congress should legislate to preempt State control over ground water. This would be a move we would strongly oppose.

The second question is analysis of the impact on the use of water for coal slurry pipelines, in particular the language of the reported version of Senate bill 1844. I will not get into any further detail than was given by Ms. Dinkins.

We generally concur with that. I will, however, say that in the final analysis of that bill and the extent of State control over the water resources should, however, be made by the States themselves communicating with you the Congress, and not by Federal officials purporting to speak on behalf of the States.

Our general satisfaction with the water language of S. 1844 should not be construed as administrative support of the bill. The administration remains opposed to the extension of Federal eminent domain authority to coal slurry pipelines.

The last question directed by the committee to our department is a description of the administration's policy with respect to the ground water appropriations and use including interstate transfers. That is a fairly easy question to answer. It is the policy of this administration that the appropriation and use of ground water should be determined under State law and procedure and where appropriate by agreements between and among the States.

I thank you again for this opportunity to present our views.

Senator **Abdnor**. We thank you very much, Dr. Bahr, for your statement. I might say that we have been joined by Senator Gorton from Washington, who is a valuable member of the committee and has a great interest in this.

Does this have any implication for States lacking in antiexport water laws, Ms. Dinkins?

Ms. **Dinkins**. I think the basic implication for such States is if they are contemplating enactment of such a law they will want to look closely at the guidance in the decision to make sure that they have made the appropriate findings on the necessity for conservation and preservation of water within the State before they would enact such an export ban.

Senator **Abdnor**. Dr. Bahr, do you have any thoughts?

Dr. **Bahr**. I concur.

Senator **Abdnor**. The report on S. 1844 refers to that bill as meeting the Court's acceptance on *Sporhase* and positive congressional action. If that is so, would you conclude that while S. 1844 excludes coal slurry from *Sporhase* that other uses of water would necessarily be covered by the impact of *Sporhase* and its inclusion on interstate commerce? Would you generally agree with that?

In other words, S. 1844 does assume that the Court's test on *Sporhase* and on positive congressional action is met. If that is true, would you conclude that while S. 1844 does exclude coal slurry from *Sporhase* that other uses of water would necessarily be covered by the impact of *Sporhase* in its conclusions in interstate commerce?

Ms. **Dinkins**. As I said in my prepared statement, I think the only danger that we would want to point out is a negative implication that could be drawn by a court from Congress having addressed this very limited activity of State regulation. The committee staff, I think, in writing the report, did a very commendable job in trying to make clear that was not the intent of the Senate, but rather that the Senate is responding to the very narrow provision of the *Sporhase* decision that says that Congress can act in this area and tell the States that they may exercise this commerce clause power.

I think the negative implication that we lay out in our testimony is the thing that we would be in a position to caution you about.

Otherwise, I think that basically what you accomplish with this bill would be the sort of congressional action that the Court talked about in *Sporhase.*

Senator **Abdnor**. Thank you.

Dr. Bahr, I see a newspaper account quoting you saying the *Sporhase* decision scares the hell out of you. If that is an accurate account, do you still feel that way? And if so, can you give us your views?

Dr. **Bahr**. I saw that same account in the newspaper. Let me put it in the context in which it was stated. I had mentioned that the Supreme Court's decision had discussed ground water overdraft as a national problem and they gave the example of the Ogallala aquifer as a multi-State aquifer and so on and that the Court suggests that Congress might do something about it.

The statement I made was within that context in that I view that in some ways to be a rhetorical question. Why did the Court raise the question in the first place if not to possibly suggest that Congress should do something about it? I don't know where a lot of misunderstandings get started but there is a perception by many, and particularly here in the East, that the entire High Plains within the next 20 or 30 years is going to dry up and blow away, and that there is going to be vast economic depression in the area and that because of this the Federal Government simply has to do something about it. That is what I took issue with and I don't believe that the Federal Government needs to take issue with that. If you look at the facts, look at the results of the High Plains Ogallala aquifer study, this is simply not borne out.

I think the last thing States need is some ill-informed person from Washington telling the States how to manage their water.

Senator **Abdnor**. Thank you.

On that rationale, let me ask you, on page 4 of your statement you say the administration will strongly oppose any legislative efforts designed to preempt State laws. Would you support an effort to strengthen the primacy of State water law?

Dr. **Bahr**. We would strongly support efforts on the part of the Congress to enhance the primacy of State water law, definitely.

Senator **Abdnor**. Thank you very much.

Senator Baucus.

Senator **Baucus**. Mr. Chairman, first of all, I would like to thank both of you again today for your strong statement in the present opposition of the administration giving eminent domain to coal slurry pipelines.

I would like to ask Ms. Dinkins, from the western point of view, if you were counsel for a Western State—Montana, Wyoming, for example—and you wanted to retain State primacy in the water, given the *Sporhase* decision in the state of the law as it is today, what would your counsel be? Would you counsel the State legislators to enact legislation to establish that nexus between the State's use of the law along with conservation and preservation or would it be for you to advice congressional delegations in Washington to try to enact some kind of Federal legislation?

What would it be from the point of view of Western States and your sole goal is to maintain State primacy?

Ms. DINKINS. If I were advising a Western State in this issue, I think I very clearly would conclude the best thing for the States to do is to review their own statutory scheme, review whatever legislative history, if it is a State that compiles legislative history, they may have from the time they enacted such a measure, and see whether it meets the Supreme Court's description of the nexus that you mentioned in conservation and preservation.

And if there were any doubt after such a review that their law might not currently be strong enough on that showing, I would recommend that they amend it to strenghten nexus.

I would not recommend, if I were representing a Western State, that they seek some type of legislative enactment at this time.

Senator BAUCUS. From the Congress?

Ms. DINKINS. From the Congress, that is right. I think I would go working through the State legislature because I think that the Supreme Court has laid open a fairly clear path for the States and I think that most of the States are quite knowlegeable and know very well why they need to keep the States water within the States borders.

Senator BAUCUS. Has your office prepared any legal memorandums on the relationship between coal slurry legislation pending now, the Senate bill in particular, and States water rights under *Sporhase*, how all that fits together, any legal analysis?

Ms. DINKINS. We have not prepared anything beyond what is contained in today's statement. We have never addressed, through any sort of memorandum of law, the impact of the coal pipeline bill in *Sporhase*. We have, of course, analyzed *Sporhase* in preparation for this hearing, and we specifically addressed the chairman's questions, but beyond that, no.

Senator BAUCUS. Another area of concern is what effect all this has on Federal reserve water rights, whether Federal reservations might be in jeopardy; that is, the coal slurry bill, for example, might in some way jeopardize some Federal reserve right. That is, in the sense that the bill states and controls the water maybe that would tend to preempt some Federal reserve water rights.

Is that a concern at all some might address to wildlife or watershed in the forest, for example?

Ms. DINKINS. We have not had any client agencies nor have any of our staff lawyers in the Lands Division expressed a concern along those lines. As you know, we take a very firm position that the Federal Government generally adjudicates the rights for reserve water through the State adjudicatory process and we are very committed to getting those rights quantified, but I have not heard of any concern by anyone about *Sporhase*.

Senator BAUCUS. Can you expand a little more why you think the language in the coal slurry bill, including the committee report, is still somewhat ambiguous to the degree it probably does not sufficiently protect States and their control of the water?

Ms. DINKINS. I think that we believe the report itself is clear and that the Senate has done what it could to make sure that in looking at the legislative history there is clear guidance as to what it meant in the bill itself.

Our concern is more that a court may choose to give great weight to that legislative history. And I think that if you compare the language of the Senate report with the language of the bill itself, you can see that the bill is simply not quite as clear as the explanations in the report. That is why we expressed a reservation.

Senator BAUCUS. So you would be uneasy if you were a Western State?

Ms. DINKINS. I would want to make sure that bill were susceptible to very strict construction on that. I think Dr. Bahr's suggestion that the Senate consult with the Western States to be sure they feel comfortable is a good one.

Senator BAUCUS. I would appreciate it if your office could do a legal memorandums on the relationship of the coal slurry bill in the Senate's S. 1844 and the *Sporhase,* the degree as to what the state of the law is now with respect to the ability of States to protect their water.

Could you do that, your office?

Ms. DINKINS. If you wouldn't mind writing for us exactly what answer you are looking for, I think that would help us. It is such a big area.

Senator BAUCUS. I would appreciate it very much if you take that analysis because it would help us very such in our part of the country. I admire very much your legal ability.

Are you aware of any other cases now pending in any appellant court dealing with this general question? The general question being the degree to which the Federal Government may or may not be expanding its control over water and States. Are there any other pending cases in this area?

Ms. DINKINS. We do not know of any appellant cases pending.

Senator BAUCUS. Are there any at the lower level that you are aware of?

Senator ABDNOR. May I ask a question about the case between Texas and New Mexico, does that have any relation?

Ms. DINKINS. That is the only one we are aware of and it is in the trial court.

Senator BAUCUS. Do you know how many States in the West have reviewed sufficient legislation now and sufficient statutes which could establish that nexus that the Court requires?

Ms. DINKINS. Well, we have not analyzed the States' statutes from that standpoint. If we had, I think at this point, it would be somewhat speculative even if we were to conclude. I suspect to reach a conclusion, I know you would have to start to reach each one individually, then you would have to outline what the court has said and compare one with the other. We have not had cause to do that.

Senator BAUCUS. Thank you both.

Thank you, Mr. Chairman.

Senator ABDNOR. Senator Gorton.

Senator GORTON. I would like to follow up on one of the subjects which Senator Baucus raised, and that is what you consider, at least implicitly, to be the disparity between the bill language of S. 1844 and the report language. And I believe that your testimony deals with that in two separate connections, both as to what the bill language itself explicitly means and second, whether or not it carries with it an implication that would be adverse to the States in areas outside of coal slurry pipelines.

Ms. DINKINS. Senator, we have laid it out to the extent that we have done that analysis. And if you would concur, I would be glad to include that response when we respond to Senator Baucus on his overall questions.

Senator GORTON. My question was, though, since in fact, there are two separate but related reservations, and since it is obviously the intention of the Energy and Natural Resources Committee in proposing this bill to the Senate, that those two questions be resolved. I think what I would like from you, as promptly as possible, because it is within the realm of possibility that this bill may be called up relatively soon, would be an amendment to the statutory language which solved each of those two problems completely to the satisfaction of the Department of Justice.

I agree with you, I think it is much less forceful, much more dangerous simply to set out legislative intent in the committee report, especially when there may be some inconsistency within that report and the statutory language itself. I would rather imagine if the Department of Justice came up with language which it thought solved both of those problems, that the sponsors of the bill would be happy to see it.

Ms. DINKINS. We will look at it.

Senator GORTON. In any event, if you could suggest such an amendment to us, I think both Senator Baucus and I would be much appreciative.

Senator BAUCUS. If the Senator would yield. I feel very strongly about this. I clearly believe the language is ambiguous. Until the bill passes—and I am not even sure it should pass.

Senator GORTON. Senator Baucus is even more forceful on that than I. It seems to me very important to come up with language that would solve those problems of ambiguity and allow S. 1844 to be voted on the basis of its merits or voted against on the basis of its merits and not this secondary issue of intent.

That is the only subject I wanted to bring up.

Senator ABDNOR. Thank you.

Senator Domenici has just joined us. We couldn't get along without his valuable input.

Senator DOMENICI. I got here late, Mr. Chairman, because I was at the White House. The President sends his regards to you and Senator Gorton.

Let me ask Ms. Dinkins, have you read the language in the coal slurry bill?

Ms. DINKINS. Yes, Senator.

Senator DOMENICI. Do you think that there is a possibility that even if it is not what has been said here, ambiguous with reference to States, assume it was unambiguous, is there a chance that it is unconstitutional because we pick one kind of water use and legislate about it?

Do you know what I mean?

Ms. DINKINS. Yes, but in considering that was not really one of the concerns that we had at the Department. I would be glad to consider it further and let you know if we think it might be unconstitutional.

Senator **Domenici**. It seems to me that while I might disagree with the *Sporhase* decision, it clearly attempts to say that Congress can determine, but that they did not and that is why they ruled that way. But I wonder if that means that we could just arbitrarily pick a kind of use from an array of uses and if we could, consistent with the commerce clause, legislate with reference to one kind if it was not significantly different than a number of other kinds of uses?

Could you check that for us?

Ms. **Dinkins**. Surely. We basically believe, though, what you are doing in the coal slurry pipeline bill is the sort of thing that the court seems to address in the *Sporhase* decision and it basically is fine from that standpoint, but we will sure look at it further.

Senator **Domenici**. Fine. I have no further questions.

I wanted to welcome Dr. Bahr. We were glad to have you come to Washington. We miss you in New Mexico but hope you are enjoying your work and we know you have a very tough assignment.

Dr. **Bahr**. Thank you, Senator;

Senator **Domenici**. I might ask you, is it within your purview to look at the ramifications of a decision like *Sporhase* on States that have laws that were inconsistent with it and to attempt to evaluate what it might mean to them?

Dr. **Bahr**. A decision of this magnitude and as it may have potential impact in the States as it may affect constitutional action is always something of interest to the Department. We at this time do not have any strong Federal interest in a lot of these issues. Our interest is what the Congress might do in the future and if Congress, as I indicated before you got here, if Congress were to legislate in some fashion to preempt State jurisdiction over water mangement and allocation, then this is something we are keenly interested in and something we would oppose.

Senator **Domenici**. Thank you, Mr. Chairman.

Senator **Baucus**. Mr. Chairman.

Senator **Abdnor**. Senator Baucus.

Senator **Baucus**. Dr. Bahr, have you heard from States attorneys general, particularly from Western States, on this question?

Dr. **Bahr**. No, I have not.

Senator **Baucus**. I wondered if the Department of Justice has.

Ms. **Dinkins**. No, sir. I suspect they are still analyzing the opinion. We meet and talk frequently with the Western States attorneys general. We will be sure to give them an opportunity to let us hear from them.

Senator **Baucus**. That is an important point.

Senator **Abdnor**. Let me say that one of our witnesses today is Mr. Craig Bell who represents the Western States Water Council.

Senator **Baucus**. That would be very helpful. I think it is an important issue. We also should hear from the States attorneys general to see whether each particular State meets the Supreme Court's test.

Senator **Abdnor**. I also ask unanimous consent to put in the record a copy of the Court's decision and also a copy of the relevant portions of the Energy Committee's report on S. 1844, and I want to also include a copy of a recent Washington Post article dealing with this matter. (See pp. 113-147.)

We thank both of our witnesses for their excellent testimony. It was very helpful and I am sure we will be talking to you on this matter. Thank you.

I am pleased to have as our next witness Mr. Warren R. Neufeld, secretary of the South Dakota Department of Natural Resources. We certainly welcome you to the committee.

STATEMENT OF WARREN R. NEUFELD, SECRETARY, SOUTH DAKOTA DEPARTMENT OF NATURAL RESOURCES

Mr. **Neufeld**. Thank you, Mr. Chairman. It is a pleasure to be here today. It is a very nice experience to have the Senator from your own State chairing the subcommittee, and it may be some advantage.

I think I have some particular experience with respect to coal slurry pipelines that I would like to relate to the committee and I will start out with that. Then I would like to discuss briefly the *Sporhase* decision and our reflections on it with respect that we had with energy transportation systems incorporated and their coal slurry pipeline project.

As you well know, the State of South Dakota was in a very difficult position when it was faced with the ETSI project. For those of you who are not aware of the entire situation, ETSI had a water rights from the State of Wyoming, authorized by the Wyoming Legislature in 1974 to remove the ground water acquifer called the Madison formation.

Their proposal to withdraw water from that formation, according to the computer model down in the EIS for the project, showed that the artisan pressure in South Dakota over the life of the project could be effected by 300 feet a head or more. The result would have been decreased flow of some of our trout streams in the Black Hills, increased wastewater treatment costs for municipalities in South Dakota and it was something that we were not looking forward to dealing with.

We had to find a way to solve that problem. We realized that litigation over the EIS was a long and tenuous process and in the end it only results in writing the environmental impact statement again and again until it becomes adequate. In addition, South Dakota had problems with respect to providing water to western communities in the State between the Missouri River which practically bisects the State running north and south to the middle and the Black Hills region of the State which is on the western border. Some of these communities have radium levels in their water supplies that approach 30 times the EPA primary drinking water standards, some of them don't have enough water no matter what the quality is, and there are many farms and ranches that need water for their livestock.

We saw an opportunity here with respect to the Missouri River to piggyback a water delivery system on to a water supply for energy development that could satisfy the needs of many western communities, farms, and ranches in South Dakota. In addition, there was some need to generate capital for water development in other areas of the State.

But underlying all of this, these are base needs for the State of South Dakota, underlying all of this was essentially an anticipation of the result in the *Sporhase* case. We looked at the Missouri River. We recognized the fact that for all practical purposes the States of Montana and Wyoming had closed their doors to the use of their water resources for coal slurry pipelines and we, quite frankly, felt that the State of South Dakota would be very hard pressed to develop a case on a traditional commerce clause analysis that would allow it to prohibit the use of Missouri River water in the State of South Dakota for use in the coal slurry pipeline. As hard as we tried, we found no way to successfully argue or logically argue that the use of 50,000 acre-feet of water from a river that exports 20 million acre-feet of water from the State of South Dakota every year was going to create any sort of substantial impact on our source or any other users of the river.

In fact, the case was just the opposite. The use of that Missouri River water for coal slurry pipeline fulfilled all of the things that the Supreme Court said the State has to fulfill in regulating water use: We were going to be conserving precious ground water resources in the Black Hills area; we were going to be providing substantial benefit to people in western South Dakota; and we were going to be providing a source of rare capital in the State of South Dakota to continue other water development.

We felt opposition to this thing would be futile. And in that regard, we anticipated the *Sporhase* decision. And I think the *Sporhase* decision confirms and strengthens the decision the State of South Dakota made, and it was truly a very difficult political and legal position to allocate some Missouri River water to the ETSI coal slurry pipeline.

With respect to the decision, I would like to make one observation with respect to that, and that is that certain people have claimed that because the water will in fact be leaving the Missouri River watershed through the coal slurry pipeline proper, that perhaps this is an illegal or improper allocation of water. I would like to point out that many, many years ago the U.S. Supreme Court has, at least on 30 occasions, said that discrimination against interbasin transfers of water that mere grounds alone are insufficient means for stopping the use of the water. It recently said in the *Sporhase* case that discrimination against interstate transfer of water on that ground alone is insufficient reason for stopping the use of the water.

I fail to see how because South Dakota may have combined an interstate transfer and interbasin transfer, how combining two insufficient reasons for stopping a water transfer is going to make one sufficent reason in this case.

One other observation. I would have to agree with Assistant Attorney General Dinkins and Dr. Bahr with respect to Federal regulation of ground water. Clearly the use of the Ogallala aquifer is a matter of multistate proportion. But that does not necessarily mean that any of the States are engaging in interstate commerce with respect to their ground water. They are local problems of local nature that happened to occur in more than one State. Just as Congress has in certain cases refrained from having the Interstate Commerce Commission or other agencies of the Federal Government deal with the intrastate sale and transport of natural gas or intrastate telephone lines, I think it would be a wise policy for Congress to allow the States to try and deal with their own particular ground water problems as they see fit.

We are not dealing here with the question of power. Clearly we know where the power resides. We are dealing here with the question of policy. And it has been my experience that local situations vary so much that it is best to deal with them with local solutions.

Another point I would like to make with respect to the State legislatures and how to deal with the *Sporhase* decision, I have to work and deal with State legislatures once a year and I consider it a very rewarding and endearing experience. My experience has been, however, that there seems to be an unwritten law or a rule of operation in State legislatures: you should not leave up to demonstration tomorrow what you can flatly prohibit today. I think many State legislatures have engaged in what I would call a case of legislative overkill. Statutes that I am aware of in my State do, in fact, fashionably discriminate against interstate commerce or the interstate use of water.

Not all of them do, but some that I have seen clearly do. And as the Supreme Court said, there seems to be no demonstration of any relationship between that prohibition or fashionable discrimination and a need to reasonably use or conserve and preserve water resources in the State.

My advice to any State legislature would be first, develop in any amendments to your State laws that you can the best legislative history you can with respect to the amount of water in your State and the need to conserve it and your future projected uses and make that legislative history very clear and make all of the declarations of policy that you need to in your statute, second, don't be afraid to leave up to your State administrative agencies the ability to make certain discretionary choices with respect to allocating water. For instance, the *Sporhase* case, the Washington Post seems to feel Mr. Sporhase has won a great victory. All he has done is gained the opportunity to have his request for a permit heard by the State of Nebraska. As we know from reading the Washington Post article, Mr. Sporhase could not get a well permit in Colorado, across the border on his same piece of property, because they feel the groundwater resources is being overused. There may be a great deal of room using administrative discretion for the State of Nebraska to make a similar determination with respect to a well located not 100 feet away from possibly the application site of Mr. Sporhase in Colorado.

Once you get into administrative hearings, negative determinations are appealable to courts, but courts should use a broad scope of review in dealing with that and unless there is absolutely no factual basis on the record to support the administrative decision, the courts will hesitate to overturn those things.

I guess I am going to advise State legislatures to violate one of their cardinal rules, and that is to trust the executive branch in a lot of these areas.

I have a couple of charts I would like to show the committee with respect to our experience with ETSI and they deal with water use in the Western States and the idea of imports and exports from the Missouri River basin. If I might, I would like to stand them up here at the end of the table and show the committee.

Senator **Abdnor**. By all means.

Mr. **Neufeld**. This is a chart that was originally put together by the Western policy office and it represents waters in the Western States. We went back to the original source of their data, the U.S. Geological Survey publication, and added in water use in the States of Iowa, Missouri, and Kansas. It will show the two Dakotas in total water use are far behind any of the other States in the region. Nevertheless, even though there is a large amount of water in Nebraska and Missouri, it is much more than what the Dakotas have.

The Missouri River exports into the Mississippi River basin every year somewhere around 55 to 60 million acre-feet of water a year despite the uses made in these States that rival some of the larger uses in the further Western States.

My bottom line conclusion on this, and I did a little bit of calculation, that if we were to take all of the projected production capacity of all the coal mines in Wyoming and Montana through the year 1990, which is the furthest projection out that I could find, if you combine that coal production and shift it all out of those regions in coal slurry pipelines and also provided water for all of the coal slurry pipelines in the United States that anybody is even talking about today, there is not a device accurate enough to measure the difference in flow of the Missouri River at South Dakota.

Senator **Abdnor**. What is the difference between the blue and the green.

Mr. **Neufeld**. The blue is industrial and domestic uses and the green represents irrigation uses, Mr. Chairman.

In my personal opinion, with respect to the concern of a lot of people with the amount of water that coal slurry pipelines are going to use, it is the biggest false alarm this country has seen since the swine flu. There was a big scare in the 1970's about swine flu and more died from the vaccination than the disease.

In that respect, I caution the Congress to move very slowly with respect to dealing in other areas of water law. I think the States ought to retain their primacy, but it would be improvident at this point to totally abdicate all of the U.S. responsibility under the commerce clause to the States. We have found a particular instance in this case where it is very wise to defer to State law to policy under coal slurry pipeline and I think that is a wise thing to do.

Senator **Abdnor**. You take all the anticipated coal slurry pipelines in the future?

Mr. **Neufeld**. I am saying there are 12 or 13 coal slurry pipelines that are proposed in the entire United States. You add their water use on top of the coal slurry pipelines that would be necessary to export all of the coal production from Montana and Wyoming projected for 1990, and you couldn't measure the difference in the Missouri River. I am not inviting them to come in and use that water, but what I am saying, we are dealing with a very specific narrow problem and I think Congress is attempting to do a very good job in S. 1844, but the threat to Western water supplies in the context of the Missouri River is minimal at most.

This chart represents in and out of the Missouri River basin that are existing. The pluses represent imports and the minuses represent exports. We are now dealing with an interstate issue in most cases, we are dealing with an interbasin issue, but I think it is instructive to look at this. This is an irrigation import in Montana, 111,000 acre-feet in 1978. The city of Butte, Mont., takes water out of the Missouri River basin and its sewer outfall is across the Continental Divide in another river. They exported almost 12,000 acre-feet of water using this method in 1978. There is a series of imports totaling about 550,000 acre-feet in the Colorado and Wyoming area with the Denver water supply and other irrigation projects. The city of Springfield, Mo., in 1978, because it sits on the divide, exported 16,800 acre-feet of water through its municipal water and sewer system in 1978.

The point I am trying to make here, Mr. Chairman, is that there is a need to defer to State law under local conditions. Each one of these cases of imports and exports had local needs justifying the decision that was made to either bring water in across the divide or send it over to the other side. Springfield can't deliver water to all of its citizens without creating an interbasin transfer.

We are not arguing with the city of Denver's proposition or actual use import of 550,000 acre-feet in 1978 from the other side of the divide. We think it is hypocritical for us to say of the Missouri River basin as a whole we can take their water to the tune of 680,000 acre-feet in 1978 but they can't have ours if it becomes necessary in the national interest.

I think that is why the language in S. 1844 needs to be strengthened—perhaps it should be strengthened, but certainly the intent is there that you should leave the specialized conditions up to the decision of the individual States because they have had experience and the expertise and ability to deal with them on an individual basis in the past.

That is my presentation, Mr. Chairman.

Senator ABDNOR. Do you think it is logical to treat water differently from other than natural resources in interstate commerce?

Mr. NEUFELD. Yes and no. I think it is logical to treat each individual situation as the facts become and the issues become very well presented and clear cut in that situation.

Congress found it wise to leave the intrastate use of natural gas up to the regulation of the States. It found it wise to leave other intrastate problems up to the regulations of the States. It is apparently finding it wise to leave the intrastate problems with respect to coal slurry pipelines up to the regulation of the individual States providing the water.

It depends what natural resources you are looking at and what the factual situation is in each case. I can't make a blanket statement that Congress ought to treat water any differently than any other resource. The States have done so and they have found it useful to them.

Senator ABDNOR. You certainly bring the point home, that each situation has to be looked at in a different perspective. Had the original plans of the slurry pipeline in Wyoming gone through with the wells on their side, that could have been a very damaging thing for South Dakota in the way of conservation and the basic needs of their people, whereas you made the point that very little effect will be caused by the proposed pipeline and will be beneficial to one and all in the State commerce, plenty of justification for carrying through with the original plan.

Mr. **NEUFELD**. That is exactly my point, Mr. Chairman. That local problems are best solved by local solutions.

Senator **ABDNOR**. Senator Baucus.

Senator **BAUCUS**. One question.

Mr. Neufeld, do you know how the gentleman from Colorado who started all this pronounces his name?

Mr. **NEUFELD**. Sporhase. Any other easy questions?

Senator **GORTON**. No questions.

Senator **ABDNOR**. Thank you.

Our last witness we are going to hear from is Mr. Craig Bell who represents the Western States Water Council.

Mr. Bell, we certainly welcome you to this committee and look forward to your testimony because we are anxious to know what some of the views of the Western States are, and I am sure you are going to be in the position to give us some information.

STATEMENT OF CRAIG BELL, WESTERN STATES WATER COUNCIL, ACCOMPANIED BY RAY W. RIGBY, CHAIRMAN, WESTERN STATES WATER COUNCIL

Senator **ABDNOR**. You have a very lengthy statement. I know you can't give it all, so let me assure you that the entire statement will be made a part of the record.

Mr. **BELL**. Thank you, Mr. Chairman.

By way of introduction, the Western States Water Council consists of members appointed by the Governors of 12 Western States that are interested in matters of State and Federal jurisdiction over water resource allocation. The chairman of the council happens to be here this morning at the hearing, Mr. Ray Rigby, from the State of Idaho. If permitted, I would like to have him join me at the witness table. Would that be acceptable?

Senator **ABDNOR**. Very much so.

Mr. **BELL**. As you mentioned, the council is vitally interested in this question. Unfortunately, the States as a whole, and the council in particular, have not had an opportunity to formally react to the *Sporhase* decision, but I would hope that I can provide some valuable information to the subcommittee and perhaps share some personal views.

As you know, the Western States have comprehensive systems for water resource allocation, it has been a vital resource to them, as you mentioned in your opening statement, Mr. Chairman.

The purpose of those systems is to make sure that water is put to the highest beneficial use for the benefit of the citizens of that State. And Congress has, I think wisely, readily and traditionally deferred to that State authority to allocate water resources. In fact, the Supreme Court in the landmark case of *California* v. *United States*, cited 37 times where Congress deferred expressly to State authority to allocate water resources. I think that deference is based on the recognition that decisions regarding water allocation profoundly effect the industries, farms, cities of that State and its environment and that those kinds of decisions are best left to those most affected.

In order to protect those water resources, virtually all the Western States have legislation dealing with export of water outside the State. Some of those statutues contain varying degrees of prohibitions and restrictions designed to protect the health and welfare, prosperity of the citizens of the State.

The Supreme Court in *Hudson County Water Company* v. *McCarter,* upheld such a State statutue which actually prohibited water of any State from being used outside the State. The Court stated that:

> The constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessity is apt to be confined to somewhat rudimentary wants and there are benefits from a great river that might escape the laywer's view. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will.

I think that indicates that in answer to the chairman's question, water is a very special resource which justifies, in my view, special treatment.

The recent Supreme Court decision in *Sporhase* runs counter to that philosophy, I think, to some extent, and especially runs counter to the earlier Supreme Court decision in *Hudson County.* The Court declared unconstitutional the provision in the Nebraska statute requiring that the State in which Nebraska ground water is to be used grant reciprocal rights to withdraw and transport ground water from that State for use in the State of Nebraska. The Supreme Court further found that ground water was an article of commerce and the Nebraska legislation was discriminatory against interstate commerce and therefore subject to the strictest scrutiny. Pursuant to that test, reciprocity requirement was determined to be invalid.

As the other witnesses have noted, that was all the Court held. The Court remanded to the lower court for a determination as to whether other provisions of Nebraska export statute would be upheld. In so doing, the Court noted that a demonstrably arid State conceivably might be able to marshal enough evidence to justify a total ban on the export of water.

The key would be establishing a close means-end relationship even a total ban on exportation of water and the purpose to conserve and preserve water.

Reciprocity requirements are not uncommon in the Western States. We have compiled some appendix to my statement, a summary of State laws relating to export of water outside the State. That is the bulk of my statement, in fact.

You will note, as you have an opportunity to review that summary, that, for example, Idaho prohibits issuance of permits to appropriate water within Idaho for diversion into another State unless the sister State has reciprocal legislation. California allows appropriation of water within that State for use in another State provided the sister State reciprocates. Washington also requires reciprocity and legislation as a condition to issuance of permits for putting Washington waters to beneficial use in some other State or nation. Thus, the implication of the *Sporhase* decisions reach far beyond the State of Nebraska. The holding invalid a portion of the Nebraska statute, the implication would appear to reach far beyond the State of Nebraska.

I would conclude that any such reciprocity provisions would appear to be in jeopardy although the Supreme Court did make clear that the constitutional propriety of any statute would be determined on a case-by-case basis to be decided as the facts would appear to warrant.

I would assume further, that I think it is safe to assume it, that Western States will be reviewing their export statutes in light of the *Sporhase* decision and I would hope as they do that the record of this hearing might remain open so that the views might be accommodated. I think that will be an important part of the hearing record, the views of the States' representatives, particularly the attorneys general of the Western States, how they view the implication of the *Sporhase* decision. We would hope and ask that the record remain open to accommodate those views.

I think the *Sporhase* case further means that any provisions which are going to pass the scrutiny of the Supreme Court are going to have to establish a direct relationship to conservation and preservation of water resources. Moreover, provisions which discriminate against uses outside of the State will be subject to the closest scrutiny.

Of particular interest, I think, is the Court's ruling that ground water is an article of commerce and therefore subject to the commerce clause.

The Western States Water Council will be assisting States in this review and analysis of the *Sporhase* case. In fact, the legal committee of the council will be meeting next month in Denver and has a primary agenda item the subject of the *Sporhase* case. That committee consists of attorneys who represent the States and I think that that will initiate a very valuable discussion about the impacts of this case.

Senator ABDNOR. Is that really the first reaction you will get from the various States at this meeting or have you had any?

Mr. BELL. It is likely to be the first reaction in terms of total Western view.

Just trying to anticipate some of the questions that would be addressed by that committee and things which I think need to be address: What are the literal implications of the *Sporhase* case? What other cases may be pending which will further address the issue? I think one has been mentioned, the *El Paso* case. The *El Paso* case may have a significant bearing on how this issue turns out. What, if any, new basis does *Sporhase* provide for assertion of Federal jurisdiction over water allocation? What additional precautions, if any, should be taken, to assure the validity of provisions in Federal law deferring to State authority regarding water allocation?

Those are some of the central questions I think need to be addressed and I compliment this subcommittee and its chairman for undertaking to initiate that discussion. I would be most happy to provide the subcommittee with the results of our discussion in the Western States Water Council.

Senator **Abdnor**. I assure you, we will be very anxious to have the results of that meeting. You know the importance of Western States. We want to know how they react and feel about it.

Would you say the *Sporhase* case is a narrow decision?

Mr. **Bell**. The decision itself is narrow. It only validates that portion of the Nebraska statute which requires reciprocity. There are some provisions in the language of the Court's decision which bother me, at least. In terms of talking about great Federal interest in ground water and allocation of that resource interstate, I think that, as I mentioned, many other States have similar provisions which I assume are going to be affected by this decision. So, it is a narrow holding, but does have implications that need to be reviewed and could be troublesome.

Senator **Abdnor**. Do you think it would be unlikely to be a basis for a decision limiting restrictions of water exportation in the future or do you think this is going to be built around?

Mr. **Bell**. I am interested in the dialog about the coal slurry pipeline legislation and the deference it gives to State law. I was fairly confident about the language prior to the *Sporhase* case. I think the *Sporhase* case does raise the possibility that despite that congressional language State permits on coal slurry pipelines could be subject to constitutional challenge.

Senator **Abdnor**. You have taken a look at this S. 1844?

Mr. **Bell**. Yes.

Senator **Abdnor**. And in the report too, as well as the law?

Mr. **Bell**. Yes.

Senator **Abdnor**. Do you think it would be liable to be construed that maybe Congress is taking a pretty negative response to *Sporhase*?

Mr. **Bell**. I think more could be done to assure that State authority is respected with respect to the authorization for coal slurry pipelines. The language itself purports to authorize the States to impose conditions despite the potential burden on interstate commerce. It does not purport to grant to the States authority which would otherwise be impermissible, and otherwise places a burden on interstate commerce that would be otherwise impermissible.

Sporhase tells us with that kind of language conditions it will still be subject to judicial scrutiny with respect to the question of whether the State conditions represent an impermissible burden on interstate commerce.

Senator **Abdnor**. Mr. Rigby, we are happy to have you here. Would you care to comment?

Mr. **Rigby**. I would say, Mr. Chairman, that we even have the chairman of the legal committee here and this has been indeed one of our prime subjects, it has been assigned to that committee and the State attorneys general have a representative there, Charlie will be there, Senator Gorton, and he will be very involved, as you know having worked with him for many years, and we will intend to do a very thorough study and we will be glad to furnish this committee with all of that information.

Senator **Abdnor**. We will welcome it.

Senator Baucus.

Senator BAUCUS. Thank you, Mr. Chairman;

I want to thank both of you for coming here and report the results of the mid-October meeting. I think it is critical that not only the council but other groups hear directly from the States and give States even more time to analyze the impact of the *Sporhase* decision as it affects them directly or the degree to which the *Sporhase* decision affects the pending coal slurry as that affects the States.

It is clear to me that we need more time to analyze this to definitely decide which route to go from the point of view of protecting water from the States' point of view in Western States in particular.

I want to thank you very much for undertaking those efforts and I encourage you to delve deeply into those inquiries when you are talking about various States in your membership and take the time necessary to fully analyze the impact of this decision. So, we commend the course you have undertaken. Thank you.

Senator ABDNOR. Senator Gorton.

Senator GORTON. I have no questions, Mr. Chairman.

Senator ABDNOR. Senator Domenici.

Senator DOMENICI. I want to ask one question. The Court in *Sporhase* stated that one of the areas that the State could properly consider "is a demonstrably arid state conceivably might be able to marshall evidence to establish a close means—end relationship between even a total ban on exportation of water and the purpose to conserve and preserve water." That is rather significant.

Do you have any thoughts as to what that ultimately is going to mean?

Mr. BELL. I think that is very significant and I think that kind of evidence is going to be crucial every time this question comes up. For example, as you know, in the *El Paso* case I know that Richard Symms and others are working very hard to marshal that kind of evidence to show that there is a close relationship between New Mexico's statute and the conservation and preservation of New Mexico's water resources. And that is the kind of evidence that is going to be necessary, I think, in each case as we examine these statutes and we will know a lot more once we have a decision in that case.

Senator DOMENICI. How many States are involved in the *El Paso* case as amicus?

Mr. BELL. I am sorry, I don't know.

Senator DOMENICI. There are some?

Mr. BELL. Yes.

Senator DOMENICI. Thank you, Mr. Chairman.

Senator ABDNOR. Thank you. If there are no other questions, we certainly do thank you for you coming all the way to Washington to give us the benefit of your testimony, and we will certainly be looking forward to additional information and facts from you as it relates to the Western States because we know the importance of it. I know we are going to be seeing a lot more of you. Thank you.

Senator BAUCUS. Mr. Chairman, before we recess, this is such a complex issue, and as was pointed out by the last witness, there needs to be further analysis of the October meeting that the council is having. I wonder if it would be appropriate if we can have another hearing on this subject particularly to hear from the State attorneys general. This issue affects the States more than it does any other entity and I think we should have the benefit of their direct testimony, the benefit and opportunity to ask questions of them so they can respond directly.

Senator ABDNOR. What does the rest of the committee think?

Senator DOMENICI. I think it is a good idea.

Senator GORTON. I agree.

Senator ABDNOR. We will see what we can do. We are under a bind here.

Senator GORTON. We may not be able to do it this year.

Senator ABDNOR. That was my only concern.

Senator BAUCUS. I am also concerned about the language in that pending coal slurry bill, the ambiguity in that language has to be addressed too.

Senator GORTON. I agree and I hope the Department of Justice responds promptly to our questions.

Senator ABDNOR. Certainly there is a need, it is just the time. I would never give any thought to coming out with any legislation between now and the end of the session because there is going to be a great need for more testimony.

Mr. BELL. May I ask how long the record will be open? I am willing to encourage States to submit individual views on this matter.

Senator ABDNOR. We will keep it open for 2 weeks. We would like to have some time with the witnesses and go back and forth in dialog. We will be happy to insert the comments in the record, but we are looking for the actual testimony on this point.

Mr. RIGBY. I might add, we are representatives of our Governors and our Governors are very concerned about his, so you are apt to hear from them and also the legislators especially in light of the testimony that has been given by Carol this morning.

Senator ABDNOR. We will keep the record open until September 30, 2 full weeks.

Thank you. With that, the meeting stands adjourned.

[Whereupon, at 11:45 a.m., the subcommittee recessed, to reconvene, subject to the call of the Chair.]

[Statements and other material supplied for the record follow:]

Department of Justice

STATEMENT
OF
CAROL E. DINKINS
ASSISTANT ATTORNEY GENERAL
LAND AND NATURAL RESOURCES DIVISION

BEFORE
THE SUBCOMMITTEE ON WATER RESOURCES
OF THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

REGARDING
SPORHASE v. NEBRASKA

SEPTEMBER 15, 1982

Thank you for your kind invitation to discuss the Supreme Court's recent decision in Sporhase, et al. v. Nebraska, ex. rel Douglas. Specifically, I would like to offer our interpretation of the decision, and its impact, as well as some comments concerning possible legislative remedies. I will also address the approach to the Sporhase decision taken by S. 1844 in the context of coal slurry pipelines.

As the Subcommittee is aware, the Supreme Court, in a 7 to 2 decision, declared ground water to be an article of commerce and therefore susceptible to regulation by Congress, and rejected the theory that states own the water. The Court further declared that the provision of a Nebraska statute which prohibits the export of water to any state that does not provide reciprocal rights violates the Commerce Clause of the United States Constitution.

The Opinion

The case arose when the Nebraska Attorney General brought an action in state court to enjoin the owners of contiguous tracts of land in Nebraska and Colorado from transporting ground water across the border without a permit. Although the owners of the land had not applied for a permit, the Nebraska statute would have banned the export of water for use in Colorado because Colorado law prohibits the export of water outside its borders. The Court viewed this portion of the Nebraska law as an undue burden on interstate commerce.

As outlined by Justice Stevens, the Court's holding was based on its resolution of three separate issues:

> (1) whether ground water is an article of commerce and therefore subject to congressional regulation; (2) whether the Nebraska restriction on the interstate transportation of ground water imposes an impermissible burden on commerce; and (3) whether Congress has granted the States permission to engage in ground water regulation that otherwise would be impermissible.

The Court first held that water is, in fact, an article of commerce. The Court specifically rejected Nebraska's argument that water was owned by the State in its sovereign capacity and, accordingly, is not an article of commerce. The Court discarded this argument as being based on the "legal fiction" of state ownership of natural resources which the Court had recently repudiated in the context of other natural resources cases. Congressional power, according to the Court, cannot depend on whether specific state property law asserts state ownership of water.

Rather, the Court concluded, ground water should be considered an article of commerce because of its substantial interstate dimension. In this regard, the Court pointed out the worldwide agricultural market for products supplied by irrigated farms. In addition, the Court stressed the multi-state character of many aquifers and the fact that ground water overdraft is a national problem.

Addressing the second question -- whether the Nebraska restriction amounts to an undue burden on commerce -- the Court also answered in the affirmative. The Court applied the traditional Commerce Clause test of a regulation described in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

In this case, the expressed purpose of the challenged Nebraska restriction was the conservation and preservation of diminishing ground water supplies. The Court did agree with Nebraska that this is a legitimate and highly important governmental objective.

The Court then held that several aspects of the challenged Nebraska law, apart from the reciprocity requirement, furthered this legitimate purpose and therefore are not facially violative of the Commerce Clause. The Court was not concerned with the fact that the restrictions applied only to interstate transfers. Such heightened restrictions, the Court reasoned, may usually implicate Commerce Clause concerns, but they are justified in the instant context for four reasons: (1) state regulation of the use of water is at the core of its police power; (2) states, including Nebraska, have had a legal expectation, fostered by congressional acts and judicial decrees, that they may restrict water within their borders; (3) state ownership claims may be "fictitious" but they are sufficient to support a limited preference for a state's own citizens; and (4) states have acquired additional rights for water within their borders due to their continuing conservation efforts.

Nebraska's reciprocity requirement did not, however, pass the Court's Commerce Clause scrutiny. First, the Court held that the restriction was "facially discriminatory" because the requirement acted as a complete ban on exporting water to Colorado. Under the Court's precedent, such a facially discriminatory restriction must have a "close fit" with its purported purpose in order to remain within the strictures of the Commerce Clause. In the Court's view, however, Nebraska's reciprocity requirement was not shown to be adequately related to the purpose of conservation and preservation of ground water. The Court strongly suggested that if Nebraska had presented evidence that it was a particularly arid state requiring a rough equivalence between import and export of water, and that intrastate distribution was feasible regardless of the distances involved, the reciprocity requirement might have survived the test. In the absence of such evidence, however, it could not pass constitutional muster.

Finally, the Court considered Nebraska's contention that its reciprocity requirement did not violate the Commerce Clause because the requirement had been authorized by Congress. It is well settled that Congress has the power to authorize a state regulation which would otherwise run afoul of the so-called negative implications of the Commerce Clause. See, for example, Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946). In making this aspect of its argument, Nebraska relied on several interstate compacts and on 37 federal statutes in which Congress has deferred to the application of state water law. The Court found this showing inadequate, however, because although it demonstrated Congress' desire to defer to state water law in myriad of circumstances, it did not evince an intent to remove any federal constitutional constraints on those state laws. The Court clearly stated that more of an express statement of congressional intent would be necessary for it to conclude otherwise.

Although the Supreme Court's holding on the Commerce Clause question appears, at first glance, to be extraordinary and unprecedented, a dispassionate reading of recent case law suggests that such holding is consistent with the Court's approach to Commerce Clause questions generally. Beginning with Wickard v. Filburn, 317 U.S. 111 (1942), a line of precedent has evolved which holds that activities within states, including purportedly "wholly local intrastate activities," may have a substantial effect on interstate commerce and are therefore within Congress' Commerce Clause authority. This line of analysis has been reflected in cases which touch upon state water regulation. As recently as 1979, the Court, overruling its earlier decision in Geer v. Connecticut, 161 U.S. 519 (1896), held that state claims of sovereign ownership of minnows in state waters did not immunize state regulation of the resource from Commerce Clause scrutiny. Hughes v. Oklahoma, 441 U.S. 322 (1979). Thus, the fact that the Court rejected the theory of state ownership and instead held that ground water as an article of interstate commerce is not an aberration, but instead, a logical extension of existing precedent. It follows, therefore, that the probability of the Court reversing its position on this fundamental issue is very remote.

The Court's treatment of the second issue in the case -- whether the Nebraska restriction amounted to an "undue burden" -- is the more enlightening and significant portion of the opinion. For despite the Court's formal rejection of the ownership theory, the Court left the states wide latitude to fashion statutes which regulate the use of water and which promote its conservation, even when such regulation may restrict the export of such water. The thrust of the Court's holding, however, is that such restrictions cannot be arbitrarily imposed; instead, such restrictions must be clearly based upon an articulated and permissible state objective, such as to promote conservation.

It is in this vein that the Court struck down Nebraska's reciprocity requirement. It did so because it found no evidence to prove that it was related to a conservation objective. The Court freely offered that Nebraska might have "credibly" supported its reciprocity requirement. And the Court even suggested that a "demonstrably arid state" could "conceivably" support a total ban on exportation of water by showing a "close means-end relationship" between the ban and the objectives of water conservation and preservation.

The clear result is that although the Court formally rejected the legal doctrine of state ownership of water, it recognized that states have sufficient interest in water use to support their regulation of waters within their borders almost as if they owned the waters. In particular, the Court in Sporhase allows each state to provide preference to its own citizens and needs. For the purpose of upholding export restrictions, the only additional requirement is that the states support their regulations in terms of legitimate governmental objectives such as conservation and preservation of ground water. The Court has made it clear that such a showing is quite possible. The Court, therefore, has left the states considerable constitutional latitude within which they may fashion legislation that regulates the export of water from their borders. Indeed, it is quite possible that given the impetus of the Sporhase decision, most of the states will be able to justify their existing restrictions in terms of the legitimate governmental objectives described by the Court.

The last aspect of the Court's decision -- its ruling that Congress has not expressed an intention to authorize state water regulation that would otherwise violate the Commerce Clause -- is clearly correct. Even the dissent does not take issue with this portion of the majority opinion. It is apparent that the Court simply reaffirmed Congress' power to regulate interstate commerce and even to modify the result of the Sporhase decision.

Congressional Authority

In discussing Congress' authority to act in this area, I am cognizant of the two major concerns expressed by the western states. First, there is significant concern about the ramifications of the Court's rejection of the state ownership theory. Historically, the theory of sovereign ownership has been the foundation of many of the western states' claims of plenary authority over their internal waters. Several western states expressly proclaim, either by statute or constitutional provision, sovereign title to those waters. See, for example, Colo. Const., Art. 16, §5; N.D. Const., Art. 17, §210; Wyo. Const., Art 8, §1; Idaho Code §42-101 (1977). And the courts of these states have upheld these provisions. See, for example, Stockman v. Leddy, 55 Col. 24, 27-29, 129 P. 220, 221-222 (1912); Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 P. 258 (1900). See also California v. United States, 438 U.S. 645, 654 n.9 (1978).

The other aspect of the opinion of particular concern to the West is its impact on all other western states with laws containing reciprocity requirements or total export bans. Several states have such restrictions on the books. In the aftermath of Sporhase, their validity has been cast into great doubt. As a result, the states have a significant practical concern. Should they simply try to gather evidence, as suggested by the Court, to support their restrictions or must they seek enactment of new, more carefully-worded requirements by their respective state legislatures? These are concerns of substantial import. Some states have simply relied on their absolute power to prohibit exports and do not have in their laws more finely-tuned methods of export restriction. Consequently, those who wish to export water from these states are likely to take full advantage of the hiatus of uncertainty now existing in the wake of the Sporhase decision to apply for permission to export water supplies. If armed only with an absolute prohibition of doubtful validity, state governments will be in a weak position to regulate such proposed diversions.

It should be emphasized that the first of these concerns, the rejection of state ownership, and with it the holding that water is an article of commerce, is not a holding which Congress may overrule. The Court has not said that the federal government owns the water so it is not altogether clear whether it would be within Congress' authority to declare the water was owned by the states. Rather, the gist of the Court's logic has been that such resources are never really "owned" by anyone or any entity, but that their use is regulated by the federal and state governments.

Similarly, it is very doubtful that Congress has the power to declare that something is not an "article of commerce." To be sure, Congress may authorize an activity that otherwise impermissibly burdens interstate commerce, but that is a far different proposition from saying that Congress may pass a law which restricts the scope of its own affirmative authority under the Clause.

In any event, this is simply a question of semantics because even assuming that Congress could so restrict itself, Congress also could undo that restriction. In either case the result is the same: following the Sporhase decision, it is clearly within Congress' constitutional authority to regulate the use of water with a substantial effect on interstate commerce including allocation, and no subsequent act of Congress can eliminate or restrict its continuing discretion to do so.

The second major concern of the western states with the Sporhase decision -- its impact on the export restrictions of Nebraska and other states -- could be addressed by Congress. Thus we conclude that it is within congressional authority to determine that export restrictions, including reciprocity requirements such as Nebraska's, and even total prohibitions on exports such as Colorado's, do not amount to undue burdens on interstate commerce. In a recent case, the Supreme Court explicitly stated that it is "well settled that Congress may use its powers under the Commerce Clause to confer upon the states an ability to restrict the flow of interstate commerce that they otherwise do not enjoy." New England Power Co. v. New Hampshire, ___ U.S. ___, 71 L.Ed.2d 188, 195 (1982). Indeed, in Sporhase, the Court commented specifically on the extent of congressional authority in this regard and cited several decisions in which it had previously deferred to such congressional determinations. Furthermore, the Court explicitly noted the power of states to regulate their water disputes through interstate compacts, ratified by Congress, and thereby avoid the strictures of the Commerce Clause.

Thus, if Congress decided it should act to accomplish a modification of that portion of the Court's Sporhase decision susceptible to legislative oversight, there are four basic avenues which Congress could follow. First, Congress could pass generic legislation which established guidelines as to what types of state export restrictions were permissible and which were not. Second, Congress could simply pass a law which listed all current state statutory export restrictions and authorized them pursuant to its Commerce Clause power. Third, Congress could address the propriety of burdens on interstate commerce created by state laws in the context of narrow factual circumstances. Fourth, Congress could enact legislation designed to spur the establishment of interstate compacts on the theory that interstate compacts are the best legal avenue for the efficient and equitable resolution of interstate water disputes.

While these and other options are open to Congress, it may be advisable for Congress to avoid enacting any "across the board" remedial legislation. It should be emphasized that the Court leaves open the possibility that the western states will be able to satisfy Sporhase simply by recasting their existing export restrictions or enacting new nearly equivalent restrictions which demonstrate a close nexus to the conservation and preservation of water.

Even more fundamentally, the mere attempt by Congress to define which types of state restrictions are proper and which are not, would amount, ironically, to the very type of federal legislation which proponents of state water rights have historically opposed. And it certainly would be no easy task to develop comprehensive guidelines defining the scope of permissible state restrictions. Such an effort may lead to a result that is more problematic from the point of view of the states than the Sporhase decision itself. This is especially true in light of the fact that part of the Court's expressed rationale for giving great deference to state regulation was based upon its perception that Congress had not availed itself of its Commerce Clause authority over ground water; presumably, if Congress did so act, that consideration would be lost.

S. 1844

Finally, at the Chairman's request, we have reviewed the provisions of S.1844, the Coal Distribution and Utilization Act of 1982. The primary purpose of this bill, if enacted, would be to provide the federal power of eminent domain to those interstate coal pipeline distribution systems (commonly known as "coal slurry pipelines") that the Secretary of Energy determines are in the national interest. As the Committee is well aware, the Administration has previously reported its views on this legislative proposal. In brief, the Administration supports competition in the field of energy transportation and believes coal slurry pipelines should be allowed to compete. Nevertheless, the Administration has not supported this bill because the need for coal slurry pipelines is not sufficiently compelling to justify usurpation of state eminent domain authority by the federal legislation.

Thus, although I can respond to this Committee's inquiry concerning the effect of S.1844 on state water law, these comments should not be construed as departing from the

Administration's previously stated position on the merits of this legislation.

As I mentioned earlier, there is no question that it is within Congress' Commerce Clause power to authorize a state law that would otherwise constitute an impermissible burden on interstate commerce. The relevant issue with regard to S.1844 is to what degree has Congress accomplished this result in the language of the bill. As noted by the Senate Energy and Natural Resources Committee Report accompanying S. 1844, Justice Stevens in Sporhase stated that congressional intent to authorize under the Commerce Clause otherwise impermissible state laws must be "expressly stated." Consequently, it is under that strict standard that one must evaluate the ultimate effect of S. 1844.

From the statutory language of S. 1844 and relevant legislative history, in particular, the Senate Committee Report, it is readily apparent that it was the Committee's intent to allow state governments to apply their existing and future water laws, including the type of export bans or reciprocity requirements at issue in Sporhase, to restrict water for coal slurry pipelines without running afoul of the Commerce Clause. Of course, whether the courts will ultimately determine that this expressed intent is sufficiently clear to immunize those laws from Commerce Clause scrutiny is necessarily a matter of speculation, the resolution of which must await judicial analysis. We do note, however, that the operative language of the bill contained in Section 5 of the bill is not, standing alone, free from ambiguity. And it is only the thorough commentary provided in the Committee Report which makes the intent of the drafters of this provision completely clear.

On balance, we conclude that the courts would be likely to pay close heed to the guidance provided in the Report and defer to this limited exercise of Commerce Clause authorization, if it were ultimately enacted by Congress.

Moreover, as I indicated earlier, there is also inevitably a risk involved in Congress' taking any action at all of this kind. For simply by entering the field of water allocation and isolating one particular aspect of state water law for congressional authorization under the Commerce Clause, there is necessarily the threat that courts will read this as expressing, by negative implication, congressional disfavor for other aspects of state water law. To be sure, the Committee Report reveals the Committee's own acute awareness of this risk and the Report makes several efforts to avoid any such judicial inference. And, moreover, we agree that should any congressional action at all be appropriate in response to Sporhase, it should be narrowly focused, not broadly worded. Still, we must caution that there are risks inherent in this proposal, especially in its reliance on judicial acceptance of certain aspects of the accompanying legislative history.

The Administration will be carefully reviewing this matter at the Cabinet level and therefore is not now proposing any specific course of action. It is the Administration's policy, however, that questions regarding water rights and allocation are, to the extent permitted by the Constitution, best left to the discretion and control of the states, and any recommendation we make will be developed in light of that fundamental principle.

The issues of whether Congress should act to modify the decision, and if so, how, are important questions. If not carefully crafted and narrowly tailored, congressional legislation in this area might well do more harm than good to the important goal of primacy of state water law. Therefore, we urge this Subcommittee and this Congress to proceed cautiously before exercising the Commerce Clause authority over the allocation of water.

Thank you.

STATEMENT OF DR. THOMAS BAHR
DIRECTOR OF THE OFFICE OF WATER POLICY
UNITED STATES DEPARMENT OF THE INTERIOR
BEFORE THE SUBCOMMITTEE ON WATER RESOURCES OF
THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
SEPTEMBER 15, 1982

Good morning. I am Thomas Bahr, Director of the Department of the Interior's Office of Water Policy. With me is David Luken, the Office's Assistant Director for State Liaison and Chairman of the Interdepartmental Working Group on Coal Slurry. Also at the table is Gary Fisher, Assistant Solicitor for Water and Power in the Department Solicitor's office.

We are grateful for this opportunity to present the views of the Department on the recent decision by the Supreme Court in the case of Sporhase, et al. v. Nebraska and related issues. We will set forth those views in response to the three specific questions you addressed to the Department.

(1) A brief description of the Sporhase decision and its impact throughout the Nation, and in particular the West

We should say at the outset that the Administration is strongly committed to State primacy on water issues. While some may view the Sporhase decision as an opening or pretext for an expanded Federal presence in groundwater management, we reject such counsel and will vigorously oppose efforts to intrude Federal authority into an area that should continue to be reserved to the States.

There is no disagreement within the Department, or with the interpretation made by the Department of Justice in Assistant Attorney General Dinkins' remarks, over the meaning of the Supreme Court's Sporhase decision. We view the holding of the Court to be very narrow and restricted to the unique facts presented therein. Sporhase was a dispute limited to the right of Nebraska to prohibit the exportation of groundwater pumped from within its borders by a private citizen of the State to a neighboring State which did not allow an unrestricted reciprocal right to have groundwater pumped within its borders transported to Nebraska. This reciprocity provision of the Nebraska statute was found to be an impermissable burden on interstate commerce because the restriction "was not narrowly tailored to the conservation and preservation rationale" that the Court stated would affect a legitimate local purpose.

The Court, after initially finding that groundwater was an article of interstate commerce, closely scrutinized each portion of Nebraska's statute and stated that only the reciprocity provision violated the Commerce Clause of the U.S. Constitution. However, the Court also held:

1. a State has the power to regulate water to protect the health of its citizens
2. State boundaries have relevance in allocation of water resources and will be respected by the Court (as shown in the equitable apportionment decrees).

3. a State may show a limited preference to its own citizens (although claims of ownership are invalid) in the utilization of water, and
4. a State may favor its own citizens in times of shortage (the conservation rationale).

The Court, however, held that the final provision of the statute, the reciprocity provision, under the specific circumstances of this case, "operates as an explicit barrier to commerce between the two States." The State bore the burden to show that this barrier was carefully tailored to effect a legitimate local interest--a burden Nebraska failed to carry.

Finally, and perhaps of most interest to the Department and to the Congress, is the Court's response to Nebraska's (and the other amicus States') argument "that Congress had authorized the State to impose otherwise impermissible burdens on interstate commerce in groundwater." The Court pointed out that Congress' silence on groundwater regulation was not sufficient to remove Constitutional restraints. In other words, the Court found that Congress had not specifically preempted either State or Federal control over groundwater; Congress is, therefore, free to exercise that control in the future. It is significant, however, that the Court, in reference to groundwater overdraft of the Ogallala aquifer, states that the multi-state character of this aquifer . . . "confirms the view that there is a significant Federal interest in conservation as well as in fair allocation of this diminishing resource." While we share the Court's conclusion that the Federal Government has the basic Constitutional authority to legislate in this area, this situation and similar situations elsewhere are best addressed by State Governments through statute or agreements between and among the States involved.

It is the Department's view that the impact of Sporhase on the Federal Government is extremely limited. If Congress fails to legislate, then the status quo in the West should remain. Only the Nebraska reciprocity statute is immediately affected. No new powers are given to the Federal Government nor will they be without explicit new Federal legislation preempting State regulation. Thus, the decision on Sporhase does not establish a precedent for the Department of Interior or other Federal agencies to interfere with or preempt the States' control of their groundwater resources. Again, this Administration will strongly oppose any legislative efforts designed to preempt State laws.

States with statutes similar to Nebraska's may wish to amend their laws in light of the guidance provided by the Court in the Sporhase decision. We do not intend to suggest changes in individual State laws. This is a State concern which should be left to the States to rectify as they so determine.

In summary, it is the Department's opinion that Sporhase has limited impact on the programs or policies of this Department. Its impact, if any, would be in the future if Congress should legislate to preempt State control over ground water; a move we would strongly oppose.

(2) An analysis of its impact on the use of water for coal slurry pipelines, and in particular the language of the reported version of S. 1844

The language of S. 1844 is consistent with our interpretation of the Sporhase decision inasmuch as S. 1844 by explicit statutory provision protects the power of a State to place restrictions on the export of water for utilization in coal slurry systems. Thus, the language grants States the power to regulate water that may be used in coal slurry pipelines in a manner consistent with the Supreme Court's opinion in Sporhase. This language applies solely to waters exported in relation to coal slurry and would not, in our opinion, apply to waters exported for other purposes.

We have said in earlier testimony that this language, in our opinion, protects State water primacy in this specific area. The final analysis of the Bill and the extent of State control should, however, be made by the States themselves communicating with you, the Congress, and not by Federal officials purporting to speak for the States.

Our general satisfaciton with the water language should not be misinterpreted as support for S. 1844 or similar proposals. The Administration remains opposed to the extension of Federal eminent domain authority to coal slurry pipelines.

(3) A description of the Administration's policy with respect to ground water appropriations and use, including interstate transfers

It is the policy of this Administration that the appropriation and use of groundwater should be determined under State law and procedure and, where appropriate, by agreements between and among States.

We again thank you for this opportunity to present our views. We will be happy to respond to questions.

Statement of Warren R. Neufeld
Secretary, South Dakota
Department of Water and Natural Resources

Mr. Chairman and members of the Committee, my name is Bob Neufeld and I am Secretary of Water and Natural Resources for the State of South Dakota. I am not here to speak in favor of coal slurry pipelines, and I am not here to speak in favor of granting them the federal power of eminent domain. I am, however, in favor of the right of private individuals to seek a profit by providing a cheaper mode of coal transportation, all to the consumers' benefit, and I am here to speak in favor of the right of individual states to choose whether or not to allocate their resources to such a venture so long as such action does not injure the valid legal rights of others.

As you know, Mr. Chairman, my state has allocated 50,000 acre-feet per year of Missouri River water to ETSI Pipeline Project for energy industry use in Wyoming. It has done so as an exercise of its sovereign right to control the resources within its borders. This is a right each state in the Union possesses subject only to the limitations in the Federal Constitution and the need to accommodate the sovereign rights of other states where they are substantially affected.

As the United States Supreme Court recently announced in Sporhase v. Nebraska, the Federal Constitution is not violated when states exchange waters across their borders but rather it is the restriction of such free commerce that raises constitutional questions. The Court explicitly stated that a state may not restrict the export of its waters unless such restriction is demonstrably related to the need of the state to properly conserve and control its resources. In other words, the interstate nature of a water allocation is not sufficient grounds in and of itself for denying the use of water in any particular case.

In fact, this very reasoning was at the heart of South Dakota's decision to allocate water to ETSI. In assessing the situation, we realized that no matter how hard we may try, South Dakota would be hard pressed to claim that the use of this miniscule amount of Missouri River water in Wyoming endangered South Dakota's populace or conservation efforts in any way. In fact, the situation was exactly the opposite.

South Dakota would be preserving its valuable groundwater resources in the Madison Formation, solving municipal water supply problems, and obtaining scarce capital for water development needs too long denied us all in one action. Clearly, no case could be made to discriminate against interstate commerce in the ETSI situation.

In fact, it was apparent that both Wyoming and Montana had for all practical purposes, closed the door to the use of their water for coal slurry purposes. If South Dakota and other states were to do the same, it would only be a matter of time before Congress would resolve the situation -- probably in favor of the more populous coal consuming states and to the detriment of the individual states producing the resources. Prof. J. David Aiken of the University of Nebraska was recently quoted as saying, "It's clear that Congress has the authority for interstate water allocation. And when push comes to shove, Congress will ultimately do whatever is in the national interest." Christian Science Monitor, August 18, 1982.

Rather than continue the process of setting up artificial barriers between the states contrary to the very purpose of the Federal Commerce Clause, South Dakota took the bold step of doing what the framers of our Constitution intended by allowing, rather than discriminating against, interstate commerce. In doing so, South Dakota established a very important precedent that state policy and not some grandiose federal scheme will determine how water will be used, it obtained very important benefits for itself, and it preserved for all of the states of the Missouri River the right to make their own decisions in the future.

With respect to the claimed detriment to other states, I refer here to my statement given to another Senate Subcommittee several months ago. A copy of that statement is attached to these remakrs. In addition, I would like to point out what can only be termed as outright hypocrisy by our sister states in complaining about South Dakota's actions here.

Since 1907 South Dakota has required a state approved permit for the use of any surface water in the state for other than domestic uses. Since 1955, that same requirement has applied to groundwater. In addition, South Dakota law prohibits the use of groundwater in excess of the average annual recharge. We have closely controlled the use of our water resources and know our present uses, future needs and the most likely way of satisfying anticipated demands.

Nebraska, on the other hand, had no controls on the use of Missouri River water until two years ago and has inadequate control on the use of its groundwater which is being depleted. In addition, Nebraska receives more of the hydropower generated from South Dakota's 527,000 acres of flooded farms than does South Dakota. To add insult to injury, the receipts from hydropower generated in South Dakota are paying for 223,000 acres of Pick-Sloan irrigation in Nebraska and only 24,000 in South Dakota.

Now Nebraska sues and says that because she may be running out of groundwater (a result of her own myopic mismanagement) South Dakota should not allocate Missouri River water without consulting her. This is a curious position for a state that was unconcerned about her own Missouri River water uses until two years ago. Furthermore, while Nebraska complains about South Dakota's use of Missouri River water, she is busy trying to figure out what to do about the 3 million acre-feet of water that leaves her borders through the Platte River every year. I hope she is consulting Iowa, Kansas, and Missouri about this problem because she certainly hasn't asked for South Dakota's opinion.

Missouri is in an even worse situtation. That state has no water rights law at all. Her representative to the Missouri Basin States Association frankly admitted that data for developing future water use projections in Missouri probably didn't exist. Data on current uses are probably also non-existent. When South Dakota makes a difficult decision on using its water resources, Missouri, who has no management at all, complains.

It is apparent that our sister states to the south have little or no idea of what their actual present uses and realisticly forseeable future needs of Missouri River water are. When South Dakota allocates a small amount of a tremendous resource to a coal slurry pipeline, it is easy to see how irrational panic can take over. The actual use of Missouri River water is something to which little serious attention has been given in the past. Rather than create a scapegoat out of South Dakota who is actively controlling its water uses, these states would be better served to spend their energy on getting their own houses in order.

When they do, they are certain to find that as my attached statement points out, there is no need for alarm and that any problems that do exist can be worked out between the states in the future.

Mr. Chairman, Thank you.

LAWS OF THE TWELVE WESTERN STATES
PERTAINING TO
INTERSTATE AND/OR INTERBASIN WATER TRANSFERS

INTRODUCTION

The following is a compilation of western state water laws relating specifically to interstate and/or interbasin water transfers. In most cases merely a copy of the pertinent laws is included. Following the state laws is a memorandum regarding the constitutionality of such laws. It must be noted that no attempt has been made to deal with federal laws which might pertain to major interstate or interbasin transfers or to deal comprehensively with interstate compacts. The editorial notes dealing with interstate compacts are illustrative only.

ARIZONA

§ 45-153. Application for interstate operations

A. An application for appropriation of water shall not be denied because the point of diversion of water described in the application or any portion of the works to be constructed for the purpose of storing, diverting or distributing water, or the place of intended use, or the lands to be irrigated by the water or part of such water, is located in another state. If the point of diversion or any of the works, or the place of intended use, or the lands or part of the lands to be irrigated by such water, are located within the state, the permit shall be issued.

B. The director may, in his discretion, decline to issue a permit if the point of diversion is within the state but the place of beneficial use is in some other state.

Amended by Laws 1979, Ch. 139, § 25, eff. April 24, 1979; Laws 1980, 4th S.S., Ch. 1, § 56, eff. June 12, 1980.

For legislative intent regarding termination of provisions added or amended by Laws 1979, Ch. 139, see note following § 45-103.

For impairment of obligations and nonseverability provisions of Laws 1980, 4th S.S., Ch. 1, effective June 12, 1980, see notes preceding § 45-401.

Article 3

APPROPRIATION FROM INTERSTATE STREAMS

Sec.
1230. Appropriation of water for use in another state.
1231. Stream flowing across state boundary; exception.
1232. Interstate lakes.

§ 1230. Appropriation of water for use in another state

Upon any stream flowing across the State boundary, an appropriation of water in this State for beneficial use in another State may be made only when, under the laws of the latter, water may be lawfully diverted therein for beneficial use in this State.

(Stats.1943, c. 368, p. 1615, § 1230.)

Derivation: Stats.1913, c. 586, p. 1012, § 15a, added Stats.1917, c. 195, p. 284, § 1.

Law Review Commentaries

Ownership of waters in the Hetch Hetchy basin and water shed. (1941) 16 S.Bar J. 380.

Library References

Waters and Water Courses 🔑130. C.J.S. Waters § 170.

§ 1231. Stream flowing across state boundary; exception

Upon any stream flowing across the state boundary a right of appropriation having the point of diversion and the place of use in another state and recognized by the laws of that state shall have the same force and effect as if the point of diversion and the place of use were in this State if the laws of that state give like force and effect to similar rights acquired in this State; provided, that this section shall not apply to the Walker River and its tributaries or claimed rights of appropriation therefrom in the State of Nevada, whether heretofore or hereafter initiated.

(Stats.1943, c. 368, p. 1615, § 1231. Amended by Stats.1961, c. 349, p. 1389, § 1, eff. May 13, 1961.)

Historical Note

The proviso was added in 1961.

Derivation: Stats.1913, c. 586, p. 1012, § 15a, added Stats.1917, c. 195, p. 284, § 1.

Cross References

Change in point of diversion, use and purpose, see § 1700 et seq.

§ 1232. Interstate lakes

Nothing in this article applies to interstate lakes, or streams flowing in or out of such lakes.

(Stats.1943, c. 368, p. 1615, § 1232.)

Derivation: Stats.1913, c. 586, p. 1012, § 15a, added Stats.1917, c. 195, p. 284, § 1.

Code Commission Notes

Strictly speaking this provision in the present law would exempt streams flowing into Lake Tahoe from the entire Water Commission Act. We assume that it was intended only to except such streams and the lake from the section, or from the act which added the section. Section 15a was added by Stats.1917, c. 195, p. 284 which affected no other part of the Water Commission Act.

Library References

Waters and Water Courses ⟹130.

C.J.S. Waters § 170.

§ 10505. Restrictions on release or assignment

No priority under this part shall be released nor assignment made of any application that will, in the judgment of the board, deprive the county in which the water covered by the application originates of any such water necessary for the development of the county.

(Added by Stats.1943, c. 370, p. 1896. Amended by Stats.1957, c. 1932, p. 3405, § 257; Stats.1959, c. 2101, p. 4872, § 4; Stats.1965, c. 989, p. 2618, § 5.)

Derivation: See Derivation under § 10500.

Law Review Commentaries

Conflicts between federal and state laws. (1965) 1 C.W.L.R. 142.

Legal aspects of interregional water diversion. Gary D. Weatherford (1968) 15 U.C.L.A.Law Rev. 1299.

Pacific Southwest water plan. Report of Assembly Interim Committee on Water, 1963–65, vol. 26, No. 8. Supp. Appendix to Journal of the Assembly, Reg.Sess., 1965.

Pacific Southwest water plan. Report of Assembly Interim Committee on Water, 1963–65, vol. 26, No. 13. Vol. 2 Appendix to Journal of the Assembly, Reg.Sess., 1965.

The "county of origin" and "watershed protection" statutes. (1960) 12 Stan.L.R. 450.

Unintended physical damage: loss of advantageous conditions. Arvo Van Alstyne (1969) 20 Hast.L.J. 469.

Notes of Decisions

In general 2
Validity 1

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1. Validity

Assignments by California department of finance to federal government of its applications to appropriate surplus water could not pass the right, title and interest in and to the water, since §§ 10500, 10504 and this section, under which department of finance filings were made created no such property right in state and gave no right to appropriate water prior to a permit. Rank v. Krug (D.C.1956) 142 F. Supp. 1, affirmed in part, reversed in part on other grounds 293 F.2d 340, rehearing 307 F.2d 96, affirmed in part 83 S.Ct. 996, 372 U.S. 627, 10 L.Ed.2d 28, affirmed in part, reversed in part on other grounds 83 S.Ct. 999, 372 U.S. 609, 10 L.Ed.2d 15.

California watershed of origin and county of origin statutes are a part of the substantive law of California and are binding on the United States and its officials. Id.

This section when properly construed so as to permit interim use by others of such water until needed by county of origin, does not violate provisions of Const. art. 14, § 3, that riparian rights attach only to so much flow as may be required or used consistently for purposes for which such lands are, or may be adaptable, and that right to use of water from natural stream shall be limited to such water as shall be reasonably required for beneficial use to be served. 25 Ops.Atty.Gen. 3.

2. In general

United States was not indispensable party in suit by certain owners of water rights to enjoin bureau of reclamation officials from impounding water at dam on river in contravention of rights of owners to beneficial use of waters below dam, where water rights had not been acquired by United States through exercise of power of eminent domain. State of Cal. v. Rank (C.A.1961) 293 F.2d 340, rehearing 307 F.2d 96, affirmed in part 83 S.Ct. 906, 372 U.S. 627. 10 L.Ed.2d 28, affirmed in part, reversed in part on other grounds 83 S.Ct. 999, 372 U.S. 609, 10 L.Ed.2d 15.

The department of water resources may release from priority or assign a portion of applications for appropriations of water from the Mokelumne River to persons for use in other than the counties of origin on the making of certain determinations under the standards and the conditions set forth in the Water Code, particularly this section and § 10504. 28 Ops. Atty.Gen. 307.

Under this section department has no duty to determine amount of water necessary for development of county of origin and may properly make assignment conditioned by general reservation of all water originating in any county which is necessary for development of that county, and such assignment would not constitute any delegation of any mandatory statutory duty of department. 25 Ops.Atty.Gen. 32.

Under this section, the word "originates" means "falls in the form of precipitation" and the word "necessary" refers to entire county, regardless of whether place of need is in different watershed from place where water originates. 25 Ops.Atty.Gen. 8.

This section and § 11460 require that when water which has been put to use in operation of projects in areas outside county of origin becomes necessary for beneficial uses of county or area of origin, such water shall be withdrawn from outside areas and made available to county or area of origin. Id.

The "county of origin" provision of this section applies only to applications for water filed under § 10500 and unless the water to be appropriated is obtained by virtue of such application, the provisions of this section and § 10500 are inapplicable to contracts between the state and water users for water exported from the area in which it originated. Op.Leg.Counsel, 1950 A.J. 785.

The "county of origin" provision of this section does not necessarily become a part of a contract to deliver water but may limit the water right on which the contract was based and, to the same extent, limit the water available to be disposed of by contract. Id.

If in the judgment of the department of water resources, an assignment or release from priority of an appropriation would not deprive a county in which the water originates of the water necessary for development of the county, and the department makes an unconditional assignment or release of the appropriation for uses in other areas, such contracts of assignment or release would not be subject to "county of origin" provision of this section. Id.

To the extent that water covered by applications now held by the department of water resources is used in connection with any facilities authorized as part of the Central Valley project or facilities which are constructed as part of the state water resources development system, county of origin provision of this section, precluding any release or assignments of water which in the judgment of the department of resources, would deprive the county in which the appropriated water originates of any water necessary for the development of the county, applies. Op.Leg. Counsel, 1959 S.J. 2943.

§ 10505.5 Territorial restrictions on use

Every application heretofore or hereafter made and filed pursuant to Section 10500, and held by the State Water Resources Control Board, shall be amended to provide, and any permit hereafter issued pursuant to such an application, and any license issued pursuant to such a permit, shall provide, that the application, permit, or license shall not authorize the use of any water outside of the county of origin which is necessary for the development of the county.

(Added by Stats.1969, c. 1359, p. 2747, § 3.)

§ 11460. Prior right to watershed water; compliance with water quality standards

(a) In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein.

(b) The project shall be operated in compliance with water quality standards set forth as conditions in permits or licenses as provided for in Part 2 (commencing with Section 1200) of Division 2 and in water quality control plans as provided for in Section 13170 or as established by contract, including rectifying failure of the United States to operate the federal Central Valley Project in accordance with such standards; provided that actions of the State Water Resources Control Board in establishing water quality standards and conditions in permits and licenses shall be a combined action meeting all the applicable requirements of Part 2 (commencing with Section 1200) of Division 2.

(c) The department, the Attorney General, and other state agencies shall take all necessary actions, including initiating or participating in judicial, administrative, and legislative proceedings, to assure that the federal Central Valley Project is operated in compliance with standards established by the State Water Resources Control Board as specified in subparagraph (A) of paragraph (1) of subdivision (a) of Section 11458.

(Amended by Stats.1980, c. 632, p. —, § 8.)

Delivery of substitute water supply, Sacramento-San Joaquin Delta, see § 12202.

1980 Amendment. Lettered the first paragraph as subd. (a); and added subds. (b) and (c).

Law Review Commentaries

Reborn federalism in Western Water Law: New Melones dam decision. Roderick Walston (1979) 30 Hast.L.J. 1645.

2. Construction and application

California law did not bar Secretary of Interior from operating Trinity River Division of Central Valley Project in response to 1976–1977 California drought so as to divert water said to be necessary to preserve Trinity River fishery, either on ground that United States never acquired right to appropriate such water under instruments governing acquisition or by virtue of provisions of Watershed Protection Act. Trinity County v. Andrus (D.C.1977) 438 F.Supp. 1368, motion denied 77 F.R.D. 29.

§ 11461. Purchase of watershed water rights

In no other way than by purchase or otherwise as provided in this part shall water rights of a watershed, area, or the inhabitants be impaired or curtailed by the department, but the provisions of this article shall be strictly limited to the acts and proceedings of the department, as such, and shall not apply to any persons or state agencies.

(Added by Stats.1943, c. 370, p. 1896. Amended by Stats.1957, c. [illegible], p. 3410, § 297.)

Historical Note

The 1957 amendment substituted "department" for "authority".

Derivation: Stats.1933, c. 1042, p. 2650, § 11.

Cross References

Beneficial use of water, see § 100.
Constitutional provision relating to conservation of water resources and riparian rights, see Const. art. 14, § 3.
Riparian rights, see § 101.
State agencies defined, see § 11102.

Law Review Commentaries

Unintended physical damage: loss of advantageous conditions. Arvo Van Alstyne (1969) 20 Hast.L.J. 469.

Library References

Waters and Water Courses 🔑190. C.J.S. Waters § 228.

Notes of Decisions

In general 1
Federal legislation 2

1. In general

Whether § 12931 gives a priority under the "watershed protection" provisions of this section and §§ 11460, 11462, 11463 to the entire San Joaquin Valley and Tulare Basin depends upon whether the area is "immediately adjacent" to the watershed of the Sacramento River, and whether the area "can conveniently be supplied with water" from the watershed of the Sacramento River. Op.Leg.Counsel, 1959 A.J. 5265.

Section 12931, providing that any facilities authorized as part of the Central Valley project or facilities acquired or constructed as part of the state water resources development system shall be acquired and operated pursuant to code governing the Central Valley project, applies to this section and §§ 11460, 11462, 11463, relating to the government of the Central Valley project and is incorporated therein by reference. Op.Leg.Counsel, 1959 S.J. 2943.

2. Federal legislation

Congress, in making appropriations for construction of dam on river which was navigable in part, regardless of whether dam was for improvement of navigation or flood control, did not intend that riparian owners whose lands were located on river below dam should have no water rights and did not authorize the taking of any water rights without just compensation. Rank v. Krug (D.C.1950) 90 F.Supp. 773.

Congress, in making appropriations for construction of dam on river which was navigable in part, would not be presumed to have intended to take away water rights of riparian owners whose lands were located on river below proposed dam without just compensation or without due process of law. Id.

Neither the acts of Congress nor reports to Congress, by language or inference, indicate an intention to take plaintiffs' water rights without compensation, or to take them at all. Id.

§ 11462. Creation of new property rights

The provisions of this article shall not be so construed as to create any new property rights other than against the department as provided in this part or to require the department to furnish to any person without adequate compensation therefor any water made available by the construction of any works by the department.

(Added by Stats.1943, c. 370, p. 1896. Amended by Stats.1957, c. 1932, p. 3410, § 298.)

Historical Note

The 1957 amendment substituted "department" for "authority".

Derivation: Stats.1933, c. 1042, p. 2650, § 11.

Cross References

Collection of rates, see §§ 11451, 11452.

Notes of Decisions

1. In general

Whether § 12931 gives a priority under the "watershed protection" provisions of this section and §§ 11460, 11461, 11463 to the entire San Joaquin Valley and Tulare Basin depends upon whether the area is "immediately adjacent" to the watershed of the Sacramento River, and whether the area "can conveniently be supplied with water" from the watershed of the Sacramento River. Op.Leg.Counsel, 1959 A.J. [illegible].

Section 12931, providing that any facilities authorized as part of the Central Valley project or facilities acquired or constructed as part of the state water resources development system shall be acquired and operated pursuant to code governing the Central Valley project, applies to this section and §§ 11460, 11461, 11463, relating to the government of the Central Valley project and is incorporated therein by reference. Op.Leg.Counsel, 1959 S.J. 2943.

§ 11463. Exchange of watershed water

In the construction and operation by the department of any project under the provisions of this part, no exchange of the water of any watershed or area for the water of any other watershed or area may be made by the department unless the water requirements of the watershed or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were the exchange not made, and no right to the use of water shall be gained or lost by reason of any such exchange.

(Added by Stats.1943, c. 370, p. 1896. Amended by Stats.1957, c. 1932, p. 3411, § 299.)

Historical Note

The 1957 amendment substituted "department" for "authority".

Derivation: Stats.1933, c. 1042, p. 2650, § 11.

Cross References

Applicability to federal government, see § 11128.

Notes of Decisions

Diversion in general 3
Federal authority 2
Validity 1

1. Validity

This section, properly construed, so as to permit interim use by others of water reserved, does not violate provisions of Const. art. 14, § 3, that right to water from natural stream is limited to such as reasonably required for beneficial use to be served, and that riparian rights may not attach to any more of flow of natural streams than may be required for purposes for which riparian lands are or may be made adaptable. 25 Ops.Atty.Gen. 8.

2. Federal authority

Section 11460 and this section are applicable to United States in its operation of Central Valley Project in so far as law of California is concerned, but compliance by United States therewith is dependent upon the fact that United States has affirmatively elected so to comply. 25 Ops.Atty. Gen. 8.

3. Diversion in general

Where riparian rights of landowners along branch channel of San Joaquin River were subordinate to water rights of corporation which, with its subsidiary and affiliated companies, owned rights to use very substantial portion of flow of San Joaquin River, and United States, which, in carrying out Central Valley Project for irrigation purposes, formulated plan whereby waters of San Joaquin River were diverted and waters of Sacramento River were substituted therefor, entered into contract with corporation and its subsidiaries for such substitution, and United States faithfully and fully delivered substitute waters, and landowners suffered no actual damage because of substitution, any impairment of landowners' rights because of substitution was at most a technicality, for which landowners could not recover from United States, since United States could not with impunity take away substitute waters. Wolfsen v. U. S. (Ct.Cl.1958) 162 F.Supp. 403, certiorari denied 79 S.Ct. 232, 358, 907, 3 L.Ed.2d 228.

The California county and watershed of origin statutes extend by statute the protection preserved by 1928 amendment of Const. art. 14, § 3 to riparian and overlying owners against diversion of water outside county or watershed before needs of riparian and overlying owners are met, to all inhabitants and property owners of county or watershed in which water originates, and they restore that protection indirectly received by all such property owners prior to 1928, when riparian and overlying owners could object to any upstream diversion of water, even though not presently needed by them. Rank v. Krug (D.C.1956) 142 F.Supp. 1, affirmed in part, reversed in part on other grounds 293 F.2d 340, rehearing 307 F.2d 96, affirmed in part 83 S.Ct. 996, 372 U.S. 627, 10 L.Ed.2d 28, affirmed in part, reversed in part on other grounds 83 S.Ct. 999, 372 U.S. 609, 10 L.Ed.2d 15.

Under California Watershed and County of Origin statutes, irrigation district located downstream from government reclamation dam was entitled to have its needs for reasonable beneficial use supplied before any water was made available for diversion to other irrigation districts outside of the watershed or county of origin, but amount which government was obligated to supply, at non-discriminatory charge, was limited by the reasonable beneficial needs of the district, to the extent those needs were not met at any given point in time by existing water supplies. Id.

§ 11128. Limitations

The limitations prescribed in Section 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof, including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part.

(Added by Stats.1951, c. 1325, p. 3216, § 1.)

Cross References

Aid from other state agencies, see § 11135 et seq.
Contracts concerning project, see § 11625 et seq.
Description of project, see § 11200 et seq.

Note

The other enactment pertaining to interstate, interbasin transfers of water is the California-Nevada Compact. This Compact, which has been adopted by California and Nevada, but not ratified by the Congress, is designed to provide for the equitable apportionment of water between the two states. Article X of the Compact, entitled "Interbasin Transfers of Use" provides, in relevent part, that either state "may use directly, by exchange, or otherwise its allocated water of the Truckee River in Lake Tahoe Basin or the Carson River Basin, or its allocated water of the Carson River in the Lake Tahoe Basin or the Truckee River Basin". In effect, the two states are permitted to make transfers of water between basins which are expressly covered by the Compact. A copy of Article X of the Compact is attached.

Article X. Interbasin Transfers of Use

Either state may use directly, by exchange, or otherwise its allocated waters of the Truckee River in the Lake Tahoe Basin or the Carson River Basin, or its allocated waters of the Carson River in the Lake Tahoe Basin or the Truckee River Basin. The commission shall have authority to take such actions as it deems appropriate so that the allocations of water made by this compact to either state shall not be adversely affected by such use in the other state.

Nothing herein shall preclude the use of Lake Tahoe as a physical facility to accomplish the use of Truckee River waters in the Carson River watershed or Carson River waters in the Truckee River watershed, but in no event shall the use of Lake Tahoe as such a physical facility be inconsistent with any provision of Article V of the compact.

COLORADO

37-81-101. Unlawful to divert water for application outside of state. (1) The general assembly hereby finds and declares that the location and availability of water in this state varies greatly from place to place and that such variation precludes the reasonable application of general law to situations and regions of such diversity. Accordingly, the general assembly hereby determines that, for the purpose of aiding and preserving unto the state of Colorado and all its citizens the use of all the waters of the springs, lakes, ponds, creeks, rivers, streams, and watercourses of this state, which waters do not increase with the growth of population and which are necessary for the health and prosperity of all the citizens of the state of Colorado, and for the growth, maintenance, and general welfare of the state, it is unlawful for any person, corporation, or association to divert, carry, or transport by ditches, canals, pipes, conduits, natural streams, or watercourses the waters of any spring, reservoir, lake, pond, creek, river, stream, or watercourse of this state into any other state for use therein. Where the same owner of agricultural land in Colorado owns agricultural land in the adjacent state that is contiguous with the agricultural land in Colorado, specific authorization of the General Assembly, on the advice of the state engineer, is required to enable the water to be used in the adjacent state for agricultural purposes only. In deciding whether or not to authorize the diversion of water from Colorado into another state, the general assembly shall consider the willingness of said state to allow diversions of its water for use in Colorado.

(2) This section shall not apply to section 37-81-103.

Source: Amended, L. 79, p. 1364, § 1.

Law reviews.

For article, "Intergovernmental Relations and Energy Taxation", see 58 Den. L.J. 141 (1980).

37-81-102. Officials charged with enforcement. It is the duty of the state engineer, the division engineers, and the water commissioners of this state to see that the waters of the state are preserved for the use and benefit of the citizens and inhabitants of the state for its growth, prosperity, and general welfare, and it is the further duty of said officials to prevent the waters thereof from being diverted, carried, conveyed, or transported by ditches, canals, pipes, conduits, natural streams, or watercourses into other states for use therein unless there is specific authorization of the general assembly, as provided in section 37-81-101. Upon its being brought to the knowledge of the state engineer of Colorado that any person, corporation, or association is carrying or transporting any of such waters into any other state for use therein, or is intending so to do, it is his duty to immediately call the matter to the attention of the attorney general, in behalf of and in the name of the state, who shall apply to any district court or to the supreme court of the state of Colorado for such restraining orders or injunctions, both preliminary and final, as may be necessary to enforce the provisions of this section and section 37-81-101, and jurisdiction is conferred upon said courts for such purposes.

Source: Amended, L. 79, p. 1365, § 2.

37-81-103. Effect of apportionment credits upon diversions of water from state. (1) In addition to the proscriptions imposed by any other laws which prohibit the diversion or transportation of water for application outside the state of Colorado, or in the event of the invalidity or inapplicability of any such other law, no water occurring in any aquifer or being a part of or hydraulically connected to any interstate stream system may be diverted or appropriated in Colorado for a use which contemplates or involves the transportation of such water into or through another state or states through which such interstate stream system flows, for use of such diverted water in such other state or states, whether as a vehicle or medium for the transportation of another substance, or for any other use, unless the amount of water so diverted or appropriated and transported through or into such other state or states is credited as a delivery to such other state or states by Colorado, of water to which such other state or states may be or claim to be entitled from such interstate source under an existing interstate compact or otherwise. Water mixed with other substances in the process of forming a slurry for the purpose of transporting any substance as a suspended solid shall not be deemed to have lost its character as water.

(2) The burden shall be upon the claimant or other person seeking to divert or appropriate water or seeking a water right based upon a claimed diversion or appropriation coming within the provisions of subsection (1) of this section to prove that a means exists and is accepted by each state, including Colorado, through which said stream system and said diverted water flows or will flow by which the credit required in this section will be entered and recognized by each such state.

(3) Where the equitable apportionment of the waters of such interstate stream system has been established by an interstate compact which is administered by a commission or other authority, any such means of credit must be expressly recognized and approved by such commission or other authority.

(4) In the event proceedings to apportion interstate waters are initiated, and if decrees to export water from the subject interstate waters in Colorado to a state through or into which the subject waters flow have been granted pursuant to subsection (1) of this section, the representatives of the state of Colorado in such proceedings shall require that credit be given to Colorado for those waters exported to such other state.

(5) This section shall not be applicable to water contained in agricultural crops, animal and dairy products, beverages, processed or manufactured products, or to products transported in cans, bottles, packages, kegs, or barrels.

Source: Added, L. 77, p. 1694, § 1.

IDAHO

CHAPTER 4

APPROPRIATIONS FOR USE OUTSIDE STATE

SECTION.
42-401. Appropriation for use in Oregon.
42-402. Application and permit.
42-403. Proof of completion of works.
42-404. License.
42-405. Idaho laws controlling.
42-406. Rules and regulations.
42-407. Appeal from department's decision.
42-408. Appropriation subject to reciprocal legislation — Certain waters excluded.
SECTION.
42-409. Appropriation for use in Wyoming.
42-410. Appropriation of water for use in Nevada.
42-411. Appropriation of water for use in Washington.

42-401. Appropriation for use in Oregon. — Whenever it shall be desired to appropriate the public waters of the state of Idaho for use in the state of Oregon, the department of water resources shall grant a permit upon proper application therefor, provided the department be satisfied that the interests of the state of Idaho will not be materially injured by such use of its public waters in the state of Oregon, and provided that the department may as a condition to the granting of any such permit require that the intending appropriator shall file with his application for permit a certificate from the proper officer or official of the state into which the water is to be diverted, showing to the satisfaction of the department of water resources that the intended appropriation would be beneficial, and that the project for which the intended appropriation is required is feasible. [1915, ch. 111, § 1, p. 254; reen. C. L., § 3265n; C. S., § 5595; I. C. A., § 41-401; am. 1951, ch. 80, § 1, p. 149.]

Compiler's notes. Section 2 of S.L. 1951, ch. 80, is compiled herein as § 42-403.

The names of the department of water administration and the director of the department of water administration (formerly the department of reclamation and the state reclamation engineer) have been changed to the department of water resources and the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 26 (§ 42-1801).

Cross ref. Appropriation for survey to determine whether or not Idaho should enter into water compacts with certain other states, see compiler's note, § 42-101.

Comp. leg. Cal. Deering's Gen. Laws 1937, Act 9091, § 15a.

Sec. to sec. ref. This section is referred to in §§ 42-403, 42-404.

ANALYSIS

Interstate adjudication.
Priority.
Rule in absence of statute.

Interstate Adjudication.

Rights, as between states, to share in the waters of interstate stream, were a matter for adjustment between states, and individual users could not raise question about the use of such water in another state out of the territorial jurisdiction of court. Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co. (1917), 245 Fed. 9.

Priority.

Right obtained by appropriation of water from stream in one state for use on lands in another state was superior to later appropriation in former state for use in former state. Weiland v. Pioneer Irr. Co. (1922), 259 U. S. 498, 66 L. ed. 1027, 42 Sup. Ct. 568.

Rule in Absence of Statute.

Prior to the passage of this act there was no authority for diversion and appropriation of waters of this state for application to a beneficial use in another state. Walbridge v. Robinson (1912), 22 Idaho 236, 125 P. 812, 43 L.R.A. (n.s.) 240.

Collateral References.
78 Am. Jur. 2d, Waters, § 340.

Cooperation or compacts between states as to water rights. 134 A.L.R. 1412.

42-402. Application and permit. — The application for permit and the permit issued thereon as provided in section 42-401, shall be in accordance with the laws of the state of Idaho, relative to the filing of application for permit and the obtaining of permit to appropriate the public waters of the state of Idaho. [1915, ch. 111, § 2, p. 254; reen. C. L., § 3265o; C. S., § 5596; I. C. A., § 41-402.]

Cross ref. Application, hearing proof of completion and issuance of license, §§ 42-202, 42-203, 42-214, 42-219.

42-403. Proof of completion of works. — Proof of completion of works under such permit shall be made in accordance with the laws of the state of Idaho relative to proof of completion under a permit to appropriate the public waters of the state of Idaho, as to all works of diversion under such permit: provided, that the department of water resources may as a condition to the issuance of a certificate of completion under such proof require from the officer or official mentioned in section 42-401 a certificate to the effect that the proper public records of such sister state show the works to have been completed under said permit, said certificate to show in second feet the capacities of the various conduits constructed and to show in acre feet the capacities of reservoir, if any there be, constructed in such sister state under said permit. [1915, ch. 111, § 3, p. 254; reen. C. L., § 3265p; C. S., § 5597; I. C. A., § 41-403; am. 1951, ch. 80, § 2, p. 149.]

Compiler's notes. Section 1 of S.L. 1951, ch. 80, is compiled herein as § 42-401.

The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-404. License. — The department of water resources shall issue a license in accordance with the laws of the state of Idaho relative to the issuance of license under a permit, upon receipt of such proof as will satisfy the department as to application of the waters to beneficial use, and may as a condition of granting any such license require a certificate from the officer or official mentioned in section 42-401, to the effect that the proper public records of such sister state show that beneficial use has been made of the waters sought to be appropriated under said permit, said certificate to show the extent of such use in second feet. If such use is for irrigation, such certificate shall give a description by legal subdivisions of the land which is irrigated by such water. If such use is for power purposes such certificate shall describe the location of the point of use. [1915, ch. 111, § 4, p. 254; reen. C. L., § 3265q; C. S., § 5598; I. C. A., § 41-404; am. 1951, ch. 80, § 3, p. 149.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

42-405. Idaho laws controlling. — Appropriations of water made under the provisions of this chapter shall be subject to the laws of the state of Idaho relative to administration, control and distribution of public waters, so long as said waters appropriated in accordance herewith shall remain within the state of Idaho: provided further, that such rights in their entirety shall be subject to all laws of the state of Idaho which have been or may be passed from time to time relative to the appropriation and control of public waters, to the end that such rights may be upon a parity with water rights within the state of Idaho. [1915, ch. 111, § 5, p. 254; reen. C. L., § 3265r; C. S., § 5599; I. C. A., § 41-405.]

Compiler's notes. The words "this chapter" refer to S.L. 1915, ch. 111, compiled herein as §§ 42-401 — 42-408.

Collateral References.
93 C.J.S., Waters, §§ 167-193.

42-406. Rules and regulations. — The department of water resources is empowered to make such rules and regulations as may be necessary to the proper administration of the provisions of this chapter. [1915, ch. 111, § 6, p. 254; compiled and reen. C. L., § 3265s; C. S., § 5600; I. C. A., § 41-406.]

Compiler's notes. For sections in which "this chapter" is compiled see compiler's note to § 42-405.

Cited in: Hart v. Stewart (1974), 95 Idaho 781, 519 P.2d 1171.

42-407. Appeal from department's decision. — Whenever any person or persons feel themselves aggrieved by the determination or decision of the department of water resources relative to the granting of permit, the issuance of certification of proof of completion or the issuance of license, as hereinbefore provided for, such person or persons may request a hearing pursuant to section 42-1701A(3), Idaho Code, if a hearing on the matter has not been held, or, if a hearing has been held, may seek judicial review pursuant to section 42-1701A(4), Idaho Code. [1915, ch. 111, § 7, p. 254; reen. C.L., § 3265t; C.S., § 5601; I.C.A., § 41-407; am. 1980, ch. 238, § 13, p. 526.]

Compiler's notes. Sections 12 and 14 of S.L. 1980, ch. 238 are compiled as §§ 42-311 and 42-1503, respectively.

Section 25 of S.L. 1980, ch. 238 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

42-408. Appropriation subject to reciprocal legislation — Certain waters excluded. — No permit to appropriate the public waters of the state of Idaho shall be granted by the department of water resources, unless the sister state, to which it is desired to divert such water, shall have enacted legislation generally similar in purport to the provisions of this chapter, whereby water may be appropriated within such sister state for use within the state of Idaho: provided, that no permit to appropriate the waters of the Pend d'Oreille, the Clark Fork of the Columbia, or Spokane rivers, or any of the streams or lakes tributary thereto whose waters drain into the said streams, shall be granted where such waters are to be used outside of the state of Idaho: and, provided further, that no permit to appropriate or impound the waters of Lake Coeur d'Alene shall be granted where such waters, or electrical energy to be developed therefrom is to be used outside of the state of Idaho. [1915, ch. 111, § 8, p. 254; reen. C. L., § 3265u; C. S., § 5602; am. 1925, ch. 3, § 1, p. 7; I. C. A., § 41-408.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Section 2 of S.L. 1925, ch. 3 declared an emergency. Approved January 15, 1925.

42-409. Appropriation for use in Wyoming. — The department of water resources shall, under the laws of this state, allow the appropriation of water in this state for beneficial use in the state of Wyoming only when, under the laws of the latter, water may be lawfully diverted therein for beneficial use in the state of Idaho. Upon any stream flowing across the state boundary a right of appropriation, having the point of diversion and the place of use in the state of Wyoming and recognized by the laws of that state, shall have the same force and effect as if the point of diversion and the place of use were in this state: provided, that the laws of that state give like force and effect to similar rights acquired in this state. [1919, ch. 118, § 1, p. 404; C. S., § 5603; I. C. A., § 41-409.]

Compiler's notes. The name of the department of water administration (formerly the department of reclamation) has been changed to the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Collateral References.

Cooperation or compacts between states as to water rights. 134 A.L.R. 1412.

42-410. Appropriation of water for use in Nevada. — Any application to the director of the department of water resources of Idaho for permit to appropriate and divert within the state of Idaho public waters for domestic, livestock and irrigation use within the state of Nevada, shall be allowed precisely as if the proposed place of beneficial use were within the state of Idaho; and any application to said director of the department of water resources to change the point of diversion or place of use of the waters of any interstate stream from a point of diversion or place of use within the state of Idaho to a point of diversion or place of use within the state of Nevada, shall be allowed precisely as if the proposed change of point of diversion or place of use were to a point or place within the state of Idaho. [1949, ch. 24, § 1, p. 41.]

Compiler's notes. The name of the director of the department of water administration (formerly the state reclamation engineer) has been changed to the director of the department of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Section 2 of S.L. 1949, ch. 24 declared an emergency. Approved February 4, 1949.

Cross ref. Allowance of applications to appropriate water, § 42-202 et seq.

Change of point of diversion and place of use, § 42-222.

42-411. Appropriation of water for use in Washington. — Any application to the director of the department of water resources of Idaho for permit to appropriate and divert public waters within the state of Idaho for use within the state of Washington, shall be allowed precisely as if the proposed place of beneficial use were within the state of Idaho; and any application to said director of the department of water resources to change the point of diversion or place of use of the waters of any interstate stream from a point of diversion or place of use within the state of Idaho to a point of diversion or place of use within the state of Washington, shall be allowed precisely as if the proposed change of point of diversion or place of use were to a point or place within the state of Idaho. All water appropriated under this section shall be appropriated for municipal and industrial use within the city of Pullman, Washington, and/or Washington State University, at Pullman, Washington. [I.C., § 42-411, as added by 1970, ch. 89, § 1, p. 217.]

Compiler's notes. The name of the director of the department of water administration (formerly the state reclamation engineer) has been changed to the director of water resources on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 20, § 28 (§ 42-1801a).

Section 2 of S.L. 1970, ch. 89 declared an emergency. Approved March 3, 1970.

MONTANA

85-1-121. Out-of-state use of water. None of the waters in the state of Montana shall ever be appropriated, diverted, impounded, or otherwise restrained or controlled while within the state for use outside the boundaries thereof, except pursuant to a petition to and an act of the legislature of the state of Montana permitting such action. Any appropriation, diversion, impounding, restraining, or attempted appropriation, diversion, impounding, or restraining contrary to the provisions of this section shall be null and void. All officers, agents, agencies, and employees of the state are prohibited from knowingly permitting, aiding, or assisting in any manner such unauthorized appropriation, diversion, impounding, or other restraint. It shall be unlawful for any person, persons, or corporation, directly or indirectly, personally or through agents, officers, or employees, either to attempt to so appropriate, divert, impound, or otherwise restrain or control any of the waters within the boundaries of this state for use outside thereof, except in accordance with the terms of this section.

History: En. Sec. 1, Ch. 220, L. 1921; re-en. Sec. 7135, R.C.M. 1921; re-en. Sec. 7135, R.C.M. 1935; R.C.M. 1947, 89-846.

85-1-122. Clark Fork River. The waters of the Clark Fork River may be impounded or restrained within the state of Montana for a distance not exceeding 25 miles from the Idaho-Montana boundary line by a dam located on said river in the state of Idaho and constructed by any person, firm, partnership, or corporation authorized to do business in the state of Montana. Any present or future appropriations of water in the watershed in the state of Montana for irrigation and domestic use above said dam shall have priority over water for power use at said dam.

History: En. Sec. 1, Ch. 3, L. 1951; R.C.M. 1947, 89-856.

Note

Also of importance is the Yellowstone River Compact, enacted in 1951. Article VII thereof authorizes the diversion of Yellowstone River system waters in one signatory state (Montana, Wyoming, and North Dakota) for use in another signatory state under outlined procedures. However, Article VII is modified by Article X which provides:

> *No water shall be diverted from the Yellowstone River basin without the unanimous consent of all the signatory states. In the event water from another river basin shall be imported into the Yellowston River basin or transferred from one tributary basin to another by the United States of America, Montana, North Dakota, or Wyoming, or any of them jointly the state having the right to the use of such water shall be given proper credit therefor in determining its share of the water apportioned in accordance with Article V herein.*

NEVADA

MISCELLANEOUS PROVISIONS

533.515 Permits for appropriation when point of diversion is outside state, or lands to be irrigated are outside state.

1. No permit for the appropriation of water shall be denied because of the fact that the point of diversion described in the application for such permit, or any portion of the works in such application described and to be constructed for the purpose of storing, conserving, diverting or distributing such water, or because the place of intended use, or the lands to be irrigated by such water, or any part thereof, may be situated in any other state, when such state authorizes the diversion of water from such state for use in Nevada; but in all such cases where either the point of diversion or any of such works or the place of intended use, or the lands, or part of the lands to be irrigated by means of such water, are situated within the State of Nevada, the permit shall issue as in other cases.

2. The permit shall not purport to authorize the doing or refraining from any act or thing, in connection with the system of appropriation, not properly within the scope of the jurisdiction of the State of Nevada, and the state engineer thereof, to grant.

[1:174:1913; 1919 RL p. 3307; NCL § 7986]

533.520 Permits for change of use or transfer of water, water rights beyond state borders not to be issued; applicability of section.

1. It is hereby declared to be contrary to the economic welfare and against the public policy of the State of Nevada to change the place of use or transfer, or to permit a change of the place of use or transfer, of water or water rights for use beyond the borders of the State of Nevada, as to any water appropriated and beneficially used in the State of Nevada for irrigation or other purposes prior to or after March 23, 1951, and no permit or authorization shall be issued or given for such change of use or transfer.

2. This section shall not apply to nor is it intended to affect waters or water rights as to such waters as shall have been prior to March 23, 1951, and which now are diverted in Nevada and which were prior to March 23, 1951, and now are used for domestic or industrial purposes beyond the borders of the State of Nevada.

[1:325:1951] + [2:325:1951]

533.522 Appropriation from interstate streams: Appropriation in this state for beneficial use in another state. Upon any stream flowing across the state boundary, an appropriation of water in this state for beneficial use in another state may be made only when, under the laws of the latter, water may be lawfully diverted therein for beneficial use in this state.

(Added to NRS by 1957, 155)

533.524 Appropriation from interstate streams: Right of appropriation having point of diversion and place of use in another state. Upon any stream flowing across the state boundary, a right of appropriation having the point of diversion and the place of use in another state and recognized by the laws of that state shall have the same force and effect as if the point of diversion and the place of use were in this state if the laws of that state give like force and effect to similar rights acquired in this state.

(Added to NRS by 1957, 155)

NEW MEXICO

72-12-18. [Underground waters declared to be public.]

For the purposes of this act [72-12-18 to 72-12-21 NMSA 1978] all underground waters of the state of New Mexico are hereby declared to be public waters and to belong to the public of the state of New Mexico and to be subject to appropriation for beneficial use within the state of New Mexico. All existing rights to the beneficial use of such waters are hereby recognized.

History: 1941 Comp., § 77-1122, enacted by Laws 1953, ch. 64, § 1; 1953 Comp., § 75-11-19.

Cross-reference. — For substantially similar provision, see 72-12-1 NMSA 1978.

Underground waters public. — Laws 1953, ch. 64, declares all underground waters to be public waters subject to appropriation for beneficial use. State ex rel. Reynolds v. Mendenhall, 68 N.M. 467, 362 P.2d 998 (1961).

Law review. — For student symposium, "Constitutional Revision — Water Rights," see 9 Nat. Resources J. 471 (1969).

Am. Jur. 2d and C.J.S. references. — 78 Am. Jur. 2d Waters § 148.

93 C.J.S. Waters § 169.

72-12-19. Removal of underground waters from state.

No person shall withdraw water from any underground source in New Mexico for use in any other state by drilling a well in New Mexico and transporting the water outside the state or by drilling a well outside the boundaries of New Mexico and pumping water from under lands lying within the boundaries of New Mexico; provided that nothing in this act [72-12-18 to 72-12-21 NMSA 1978] prohibits the transportation of water by tank truck from any underground source in New Mexico to any other state where the water is used for exploration and drilling for oil or gas. The owner of the well from which the water is withdrawn shall have a duty to ascertain that the water exported is used only for the above purposes and such owner shall keep and maintain accurate records of the amount of water withdrawn and make such records available to the state engineer of New Mexico upon request. The amount of water withdrawn from any one well for such exportation shall never exceed three acre-feet.

History: 1941 Comp., § 77-1123, enacted by Laws 1953, ch. 64, § 2; 1953 Comp., § 75-11-20; Laws 1959, ch. 319, § 1.

Cross-reference. — For definition of "acre-foot," see [illegible] NMSA 1978.

Emergency clause. — Laws 1959, ch. 319, § 2, makes the act effective immediately. Approved April 3, 1959.

State engineer. — See 72-2-1 NMSA 1978.

C.J.S. reference. — 94 C.J.S. Waters § 313.

OREGON

DIVERSION AND USE OF WATERS OUT OF STATE

537.810 Out-of-state use, diversion or appropriation of waters without legislative consent prohibited; terms of consent. No waters located within this state shall be diverted, impounded or in any manner appropriated for diversion or use beyond the boundaries of the state except upon the express consent of the Legislative Assembly. In the event the Legislative Assembly shall give its consent to any such request it may attach thereto such terms, conditions, exceptions, reservations, restrictions and provisions as it may care to make in the protection of the interests of the state and of its inhabitants.

537.820 Application of provisions to waters forming common boundary between states. ORS 537.810 to 537.860 shall also apply to the waters located within the boundaries of this state of any river, stream, lake or other body of water serving as part of the common boundary of this state and any other state and over which this state has concurrent jurisdiction, except that said sections shall not apply to the diversion, impoundment or appropriation of waters for the development of hydroelectric energy, flood control, irrigation or other uses in waters forming a boundary of the state in cases where such waters are not to be diverted from the drainage basin wherein such waters are located.

537.830 Filing upon or condemnation of waters without legislative permission prohibited. No person, or agency of any state or of the United States, shall attempt to file upon or to condemn any waters within the boundaries of this state for any purpose mentioned in ORS 537.810 to 537.860 without first obtaining legislative permission as provided by those sections.

537.835 City of Walla Walla, Washington, may appropriate, impound and divert certain waters from Mill Creek. (1) Pursuant to the provisions of ORS 537.810, consent is hereby given to the City of Walla Walla, a municipal corporation of the State of Washington, to appropriate, impound and divert certain waters from Mill Creek, a tributary of the Walla Walla River, located in Township 6 North, Range 38, E.W.M., Umatilla County, Oregon, for the beneficial use of both the State of Oregon and within the City of Walla Walla, State of Washington, subject to the following terms and conditions:

(a) The City of Walla Walla shall pay the entire cost of constructing and maintaining this project; and

(b) The City of Walla Walla shall employ only residents and inhabitants of the State of Oregon in the construction and maintenance of the project.

(2) The Water Resources Director may from time to time direct that a designated portion of the impounded waters shall be held in the State of Oregon for fire protection, for use by Oregon residents, for wildlife habitat needs, and to maintain proper stream flow during the summer months.

(3) Prior to commencing construction, the City of Walla Walla shall make application for such appropriation, impoundment and diversion to the Water Resources Director and such appropriation, impoundment and diversion shall be allowed upon such additional terms, conditions, reservations, restrictions and provisions, including minimum stream flow, as the Water Resources Director shall impose for the protection and benefit of the State of Oregon. [1975 c.732 §2]

537.840 Legislative consent; filing of certified copy; appropriation rights and procedure. Upon receiving legislative permission to appropriate waters under ORS 537.810 to 537.860, the permittee, upon filing in the office of the Water Resources Director a certified copy of the Act, certified to by the Secretary of State, may proceed to obtain an appropriation of waters in the manner provided by the laws of this state for the appropriation of waters for beneficial use, subject to all existing rights and valid prior appropriations and subject to the terms, conditions, exceptions, reservations, restrictions and provisions of such legislative consent.

537.850 Suits to protect state interests; right of redress to private persons. In the event of any violation or attempt to violate any of the provisions of ORS 537.810 to 537.860, the Governor shall cause to be instituted such suits and actions as may be necessary to protect and defend the sovereign rights and interests of the state in the premises. Persons are given right of redress against such violator at private suit or action under any appropriate remedy at law or in equity.

537.860 Vested rights protected. ORS 537.810 to 537.850 shall not affect any valid prior appropriation or water right existing on May 12, 1951.

537.870 Out-of-state municipalities; acquisition of land and water rights in Oregon. Subject to the limitations imposed by ORS 537.810 to 537.860, any municipal corporation of any state adjoining Oregon may acquire title to any land or water right within Oregon, by purchase or condemnation, which lies within any watershed from which the municipal corporation obtains or desires to obtain its water supply.

PENALTIES

537.990 Penalties. (1) Violation of ORS 537.130 (2) is punishable, upon conviction, by a fine of not less than $10 nor more than $250, or by imprisonment in the county jail for not more than six months, or both.

(2) Any person who wilfully diverts or uses water to the detriment of others without compliance with law shall be punished as provided in subsection (1) of this section. The possession or use of water, except when a right of use is acquired in accordance with law, shall be prima facie evidence of the guilt of the person using it.

(3) Violation of ORS 537.535 (1) is punishable, upon conviction, by a fine of not less than $10 nor more than $250, or by imprisonment in the county jail for not more than six months, or both. Violation of ORS 537.747 is a Class B misdemeanor.

(4) Justice courts and district courts shall have concurrent jurisdiction with the circuit courts in the trial of all violations under this section. [Subsection (3) enacted as 1955 c.708 §36; 1963 c.290 §3; 1981 c.416 §6]

Note

The Goose Lake Interstate Compact between the States of Oregon and California provides for diversion, storage, and conveyance of water from the Goose Lake Basin in one state for use within the basin in the other state. However, export of water from the basin for use outside the basin without prior consent of both state legislatures is prohibited. The rights to a use under the terms of the Compact must be secured by appropriation under the general laws of Oregon or California and the laws of the state from which the water is to be taken. See 45 Oregon Revised Statutes Section 542.510 et. seq. This Compact has not been approved by Congress; therefore, even though passed by the states it is not operational or effective.

The states of California and Oregon have also entered into the Klamath River Basin Compact. Under the Compact, each state is granted the right to construct and operate facilities for the measurement, diversion, storage and conveyance of water from the Upper Klamath River Basin in one state for use in the other "insofar as the exercise of such right may be necessary to effectuate and comply with the terms of its Compact." The Compact further provides that rights to the use of unappropriated waters originating with the Upper Klamath River Basin for any beneficial use in the Upper Klamath River Basin may be acquired by appropriation under the laws of the state where the use is to be made. However, a number of additional provisos are set forth in the Compact with respect to such uses. Among these is a general prohibition with respect to uses in Oregon against diversion of waters from the Upper Klamath River Basin, except for out-of-basin diversions of waters originating with the drainage area of Fourmile Lake. A condition imposed with respect to uses in California is that waters diverted from the Klamath River within the Upper Klamath River Basin for use in California cannot be taken outside the Upper Klamath River Basin. See 45 Oregon Revised Statutes Section 542.610 et. seq. The Compact is administered by a commission composed of the representative of the California Director of Water Resources and the Oregon Water Resources Director and the chairman who is appointed by the President. The Commission is funded one-half by each state and the chairman has no vote.

TEXAS

§ 5.085. Interwatershed Transfers

(a) No person may take or divert any of the water of the ordinary flow, underflow, or storm flow of any stream, watercourse, or watershed in this state into any other natural stream, watercourse, or watershed to the prejudice of any person or property situated within the watershed from which the water is proposed to be taken or diverted.

(b) No person may transfer water from one watershed to another without first applying for and receiving a permit from the commission to do so. Before issuing such a permit, the commission shall hold a hearing to determine the rights that might be affected by the transfer. The commission shall give notice and hold the hearing in the manner prescribed by its rules.

(c) A person who takes or diverts water in violation of this section is guilty of a misdemeanor and upon conviction is punishable by a fine of not less than $100 nor more than $500 or by confinement in the county jail for not more than six months.

(d) A person commits a separate offense each day he continues to take or divert water in violation of this section.

UTAH

73-2-8. Power to appropriate water from any source in Utah for beneficial purposes in other states — Co-operation with other states. The state engineer is hereby authorized and empowered to receive and grant applications to appropriate water from any source in Utah, where such water is to be conveyed and used for beneficial purposes within any state, and to issue certificates of appropriation for this water only after the state engineer shall evaluate and make public the advantages to the State of Utah and its citizens of exporting water. The state engineer shall co-operate with the state engineer or other proper officer of any state in the determination, supervision, regulation and control of all water and water rights and to that end the state engineer, by and with the consent of the governor, may enter into agreements with the proper officer of any state to carry out the purposes of this subsection.

History: L. 1921, ch. 70, § 1; R. S. 1933, 100-2-8; L. 1941, ch. 96, § 1; C. 1943, 100-2-8; L. 1953, ch. 133, § 5; 1979, ch. 246, § 1.

Compiler's Notes.

The 1941 amendment substituted "provided the law of such border state in like manner permits the appropriation of water therein for use in Utah" for "upon satisfactory evidence that the waters appropriated have been put to the beneficial use set forth in the application" at the end of the present first sentence; inserted "The state engineer" at the beginning of the second sentence and added a third sentence which read: "The state engineer is hereby authorized to represent the state of Utah in all interstate conferences held for the purpose of negotiating and entering into compacts between the state of Utah and one or more sister states for the division of the waters of interstate rivers, lakes, or other sources of supply; provided, however, that any such compact signed by the state engineer shall not become binding upon the state of Utah until it has been ratified and approved by the legislature of Utah and the legislatures of other states which are parties thereto"; and made minor changes in phraseology and punctuation.

The 1953 amendment deleted the third sentence added by the 1941 amendment.

The 1979 amendment substituted "any source" before "in Utah" in the first sentence for "interstate streams"; substituted "within any state" in the first sentence for "within any border state"; substituted "for this water * * * exporting water" at the end of the first sentence for "hereon; provided, the law of such border state in like manner permits the appropriation of water therein for use in Utah"; substituted "any state" both places it appears in the second sentence for "any adjoining state"; deleted "in interstate streams" after "water rights" in the second sentence; deleted "the necessary and lawful" before "agreements" in the second sentence; deleted "duly authorized thereto" after "the proper officer" in the second sentence; substituted "subsection" at the end of the second sentence for "section"; and made minor changes in punctuation.

Sections 1 to 4 of Laws 1953, ch. 133 are compiled as sections 73-10-3, 73-10-4, 73-10-8 and 73-10-11.

Cross-References.

Representative to be appointed by the board of water resources to represent the state in interstate conferences and compacts, 73-10-3.

WASHINGTON

90.03.300 ——Diversion of water for out-of-state use—Reciprocity. No permit for the appropriation of water shall be denied because of the fact that the point of diversion described in the application for such permit, or any portion of the works in such application described and to be constructed for the purpose of storing, conserving, diverting or distributing such water, or because the place of intended use or the lands to be irrigated by means of such water, or any part thereof, may be situated in some other state or nation, but in all such cases where either the point of diversion or any of such works or the place of intended use, or the lands, or part of the lands, to be irrigated by means of such water, are situated within the state of Washington, the permit shall issue as in other cases: *Provided, however,* That the supervisor of water resources may in his discretion, decline to issue a permit where the point of diversion described in the application is within the state of Washington but the place of beneficial use in some other state or nation, unless under the laws of such state or nation water may be lawfully diverted within such state or nation for beneficial use in the state of Washington.

LEGISLATIVE HISTORY

Enacted Laws 1917 ch 117 § 31-a, as added by Laws 1921 ch 103 § 3 p 305.

See RRS § 7383 and former RCW 90.20.070.

CROSS REFERENCES

Interstate compact commission: RCWA Chapter 43.57.

Reciprocity in appropriation of water for use outside state: RCWA 90.16.120.

Water for use outside state: RCWA 90.16.110.

NOTES OF DECISIONS

In condemnation proceeding to secure right of way for irrigating canal, it is not necessary for irrigation company to show that it has condemned or purchased water rights from riparian owners of stream it proposes to tap. Prescott Irr. Co. v Flathers (1899) 20 Wn 454, 55 P 635.

Where irrigation company is openly and in good faith prosecuting construction of its ditch for use of waters of stream, it is not necessary that it previously condemned its water rights in order to give priority over another company lower down on stream subsequently seeking to use same waters. State ex rel. Kettle Falls Power & Irr. Co. v Superior Court (1907) 46 Wn 500, 90 P 650.

Where irrigation company, prior in point of time, was already in good faith prosecuting its construction work for use of waters of stream, another company acquiring riparian rights for use of same waters took such rights subject to condemnation existing against riparian owners in favor of prior company. State ex rel. Kettle Falls Power & Irr. Co. v Superior Court (1907) 46 Wn 500, 90 P 650.

As between two irrigation companies seeking to use same waters, one prior in time is prior in right, and fact that later company is public carrier does not enlarge its riparian rights. State ex rel. Kettle Falls Power & Irr. Co. v Superior Court (1907) 46 Wn 500, 90 P 650.

Irrigation company may condemn land for reservoir sight, where it is necessary to store water in order to accomplish irrigation, since such is "necessary corporate purpose" within this statute. State ex rel. Golden Valley Irr. Co. v Superior Court (1912) 67 Wn 556, 122 P 19.

90.16.110 **Water for use outside state.** Whenever the use of water shall be necessary for domestic, manufacturing, irrigation, or in interstate transportation at or for any incorporated or unincorporated city, town, village or hamlet situated partly in Washington and partly in an adjoining state or where any city, town, village or hamlet is incorporated on one side of the state line and there are inhabitants living in adjacent and contiguous territory on the other side, it shall be lawful for any person, association or corporation to locate, appropriate, divert and deliver any of the unappropriated public waters of this state necessary for the use of such city, town, village or hamlet and the inhabitants thereof and those residing in and embracing such contiguous territory both within this state and such adjoining state; and locations may be made and authority is hereby granted for such purpose the same as for any other appropriation within the state and a diversion and delivery for such purpose shall have the same force and effect as if made for use wholly within this state and any appropriation, diversion or use heretofore made for such purpose shall be deemed as valid and legal as if made for a use wholly within this state and priority thereof shall date from the appropriation and diversion the same as if it had been made for use wholly within this state.

LEGISLATIVE HISTORY

Enacted Laws 1919 ch 41 § 1 p 85.
See RRS § 11577.

CROSS REFERENCES

Appropriation of water rights: RCWA 90.03.010.
Diversion of water for out-of-state use: RCWA 90.03.300.
Necessity of reciprocity: RCWA 90.16.120.
Water rights of United States: RCWA Chapter 90.40.

COLLATERAL REFERENCES

Am Jur Waters §§ 291 et seq.
CJS Waters § 171.

Forms:

13 Am Jur Legal Forms, Nos. 13:1611 et seq. (forms as to conveyance of water).

21 Am Jur Pl & Pr Forms, Nos. 21:251 et seq. (pleading and practice forms relating to supply of water).

Law Review Articles:

31 Wn LR 243 (Washington water rights).

Key Number Digests:

Waters and Water Courses 🔑131.

90.16.120 ——Reciprocity. The provisions of this act shall not apply to any territory or the inhabitants thereof situated or located in any adjoining state which does not by its laws, usages or legal regulations grant similar or reciprocal rights, privileges and opportunities to this state and its inhabitants and adjacent and contiguous territory whether incorporated or unincorporated as in this act specified.

LEGISLATIVE HISTORY

Enacted Laws 1919 ch 41 § 2 p 86.
See RRS § 11578.

REVISER'S NOTE

"This act" (1919 c 41), is codified in RCW 90.16.110 and 90.16.120.

CROSS REFERENCES

Appropriation of water rights: RCWA 90.03.010.
Interstate compact commission: RCWA Chapter 43.57.

COLLATERAL REFERENCES

Am Jur Constitutional Law § 220.
CJS States § 8, Waters § 171.

Forms:

8 Am Jur Pl & Pr Forms, No. 8:379 (motion for taking of judicial notice of statute of adjoining state).

Key Number Digests:

States ⇐5.
Waters and Water Courses ⇐131.

WYOMING

§ 41-3-105. Use of water outside the state.

No use of water outside the state of Wyoming, except water allocated to other states, shall be granted without prior consent of the legislature. (Laws 1974, ch. 23, § 2; 1975, ch. 67, § 1.)

Editor's note. — This section as it appeared before the 1975 amendment was located under § 41-3-104 as an editor's note.

Application of act. — Section 3, ch. 23, Laws 1974, reads: "Nothing in this act shall apply to or affect any petition which is pending before the board as of February 1, 1974."

Effective date. — Section 4, ch. 23, Laws 1974, makes the act effective immediately upon passage. Approved February 20, 1974.

§ 41-3-115. Applications for use of water outside the state.

(a) All water being the property of the state and part of the natural resources of the state shall be controlled and managed by the state for the purpose of protecting and assuring the maximum permanent beneficial use of waters within the state.

(b) None of the water of the state either surface or underground may be appropriated, stored or diverted for use outside of the state or for use as a medium of transportation of mineral, chemical or other products to another state without the specific prior approval of the legislature on the advice of the state engineer.

(c) No holder of either a permit to appropriate water or a certificate to appropriate water, nor any applicant for a right to appropriate the unappropriated water of this state, may transfer or use the water so appropriated, certificated or applied for outside the state of Wyoming without prior approval of the legislature of Wyoming, provided further, that as a prerequisite to any use or transfer any adjoining state in which any such water is used shall grant reciprocal rights for the use of water in Wyoming.

(d) Subject to the approval of the state engineer, and notwithstanding the provisions of section 41-10.5(b) [subsection (b) of this section] of the statutes, the legislature hereby approves the proposal of Energy Transportation Systems, Inc., a Delaware corporation, to appropriate no more than twenty thousand (20,000) acre-feet annually of the unappropriated underground waters of the state for use in a coal slurry pipeline extending from Wyoming to Arkansas. The state engineer, may in his discretion, issue permits to appropriate such underground water to the extent necessary not to exceed twenty thousand (20,000) acre-feet annually to meet the requirements of that project and subject to such conditions as the state engineer may require, and provided that the state engineer determines to his satisfaction that such appropriations of the project meet his requirements, which requirements shall include, but are not limited to the following:

(i) That the water to be used is underground water, from the Madison or Bell Sand formations;

(ii) That such use will not interfere with domestic, municipal, stock watering or irrigation uses or other existing beneficial uses within Wyoming;

(iii) That the water is withdrawn from a source of supply located at a minimum of two thousand five hundred (2,500) feet below the ground surface, from wells constructed to a depth of more than two thousand five hundred (2,500) feet beneath the ground surface; and

(iv) That the wells are cemented or otherwise sealed off from the surface of the ground to the top of the formation or formations from which the water is withdrawn, in order to prevent any movement of water in the well outside the casing and to prevent the entry of water from overlying aquifers into said wells, and that the water so withdrawn will be used to develop other resources of Wyoming.

(e) Nothing in subsection (d) shall be construed as a directive for the state engineer to grant his approval.

(f) The permits shall contain the following requirements and provisions, and any others deemed necessary or desirable, for protection of Wyoming's water and other resources, ecology and environment, by the state engineer and environmental quality agency after mutual consultation:

(i) If at any time the permittee so operates his wells as to lower the water table so as to endanger the water supply of any domestic, municipal, stockwatering or irrigation use or other beneficial use of appropriated water within the state of Wyoming existing at the time the application underlying this permit was filed, permittee may be required by the state engineer at permittee's own expense to either:

(A) Deepen the well and pay the additional costs of pumping water for any person whose water supply has been endangered by reason of permittee's pumping operation so that it is equal to the supply available prior to permittee's pumping; or

(B) Provide any person whose water supply is endangered that quantity of suitable water required to equal the amount available prior to permittee's pumping operation; or

(C) Obtain its water from another source that will not significantly affect or endanger the supply of water available to the beneficial users herein described;

(ii) Permittee will pay the costs of court and reasonable fees of attorneys and experts of any person who is required to enforce the terms of this permit by legal action, provided said person is successful in obtaining a final judgment in his favor and against permittee, and provided said fees are found by a court of competent jurisdiction to be both reasonable and necessary. Any such action must be brought in the courts of the state of Wyoming;

(iii) If the state engineer finds reasonable cause to believe the permittee has endangered or is about to endanger the existing water table, an order to show cause why the permit should not be terminated or suspended may be issued. Any hearing held under this section shall conform with the provisions of the Wyoming Administrative Procedure Act [§§ 9-4-101 to 9-4-115]. (Laws 1974, ch. 25, § 1.)

Note

Wyoming is also a signatory state to the Yellowstone River Compact enacted in 1951. Article VII of the Compact authorizes the diversion of the Yellowstone River System waters in one signatory state for use in another signatory state according to specified procedures. However, Article X prohibits any diversion from the Yellowstone River Basin without the unanimous consent of all the signatory states. For a more detailed description of these provisions please refer to Montana's section in this report. Wyoming, unlike Montana, passed its statutory restrictions on the exportation of state waters after ratifying the Yellowstone River Compact. However, the Compact provides that any amendments must be approved by each of the signatory states and consented to and approved by the United States Congress. It is the editor's opinion, therefore, that the Wyoming statute has no application with respect to diversions within the terms of the Yellowstone River Compact.

MEMORANDUM

WESTERN STATES WATER COUNCIL

MEMORANDUM

BY: CRAIG BELL

RE: CONSTITUTIONALITY OF STATE STATUTES PROHIBITING OR RESTRICTING THE EXPORTATION OF STATE WATERS

DATE: NOVEMBER 4, 1976

The statutes compiled in this report prohibiting or restricting the exportation of state waters undoubtedly resulted from the desire to preserve the vital water resources for the citizens of the respective states. No one can deny that the state has a legitimate interest in preserving its natural resources. However, a state is limited in exercising its police power in such a manner as to restrict or interfere with interstate commerce. Therefore, each statute raises the question of whether its prohibition against or its restriction on the exportation of state waters constitutes a legitimate exercise of the police power, or whether it is an interference with and unreasonable burden on interstate commerce and therefore unconstitutional. 1/

Typical of the provisions in these statutes is a general prohibition against the use of water outside the state without legislative approval. 2/ Common also is a restriction against the granting of permits for use of water outside the state in the absence of reciprocal rights from the benefiting state. 3/ In one instance, the state statute expressly prohibits the use of water for slurry to export coal outside the state. 4/ In another case, the statute provides that no waters of the state shall be used as a medium of transportation of mineral, chemical or other products to another state without specific approval of the legislature. 5/ Questions regarding the constitutionality of such statutes can best be considered by analyzing these provisions separately. However, as a preface, two apparently different views on the validity of such statutory prohibitions, each finding support in a Supreme Court decision, should be reviewed.

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The first view upholds the validity of such statutory restrictions and stems from the Supreme Court's decision in *Hudson County Water Co. v. McCarter*. 6/ In this case, the Supreme Court upheld a New Jersey statute which read as follows:

> "It shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river or stream of this state into any other state for use therein." 7/

The Supreme Court upheld the statute in the following terms:

> " The constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the state is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep, and give no reason for its will." 8/

An apparently different view was expressed in *Altus v. Carr,* 9/ a three judge federal district court decision which was affirmed by the Supreme Court, per curiam and without opinion, 10/ striking down a Texas statute which had been passed after the plaintiff had entered into a contract with a Texas resident to purchase his groundwater and export it to Oklahoma. The statute in question read as follows:

> " No one shall withdraw water from any underground source in this state for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the state unless the same be specifically authorized by an act of the Texas legislature and thereafter as approved by it." 11/

The federal district court limited its holding to the question of the statute's interference with the transportation and use of groundwater after it had been withdrawn from the well and become personal property. The holding can thus be distinguished from the earlier *McCarter* case, since the New Jersey statute in *McCarter* did not endeavor to cut off an established use of New Jersey water in New York. Notwithstanding, the federal district expressed a substantially divergent view from *McCarter* of the propriety of the state's attempt to restrict the exportation of state waters. This view apparently rested upon the following theories. First, the district court considered water to be an article of commerce. Secondly, the court found insufficient public interest to support the state action. Finally, the court found an impermissible statutory attempt to interfere with and burden interstate commerce. [12]

Because the federal district court limited its holding, the Supreme Court's affirmance of the federal district court decision should not necessarily be considered as tacitly overruling *McCarter*. However, the district court refused to be pursuaded by the reasoning in *McCarter* and instead concluded that water was like natural gas and should be viewed as an article of commerce. Its transmission across state lines therefore constituted interstate commerce according to the court. The possibility therefore exists that the *per curiam* affirmance of the district court's decision indicates the Supreme Court's own willingness to abandon McCarter. [13] Nevertheless, there is nothing in the Supreme Court's natural gas cases to conclusively determine that the court has abandoned *McCarter* in cases involving water regulation. Indeed, the Supreme Court has implied that there is a fundamental difference between natural gas and water as natural resources. [14] It may be that this difference is sufficient to permit the states to restrict the exportation of water even when the same rationale will not allow them to condition the exportation of natural gas. [15] Furthermore, it seems unlikely that the Supreme Court would alter a long standing legal view without an opinion. It thus may well be that the court affirmed solely on the basis of the narrow holding in *Altus* without adopting the broader language of the decision. However, this does not mean that the Court will continue to follow *McCarter* when another case come before it in which a similar prohibition against the exportation of water is challenged and the Court decides that the entire concept of *McCarter* is ripe for review. Therefore, it is well to consider typical provisions of state statutes prohibiting or restricting the exportation of water in light of current Supreme Court doctrine on the reach of the commerce clause.

General Prohibition Against Out-Of-State Use Without Legislative Approval

Supporting the validity of a prohibition against exporting state waters without legislative approval is the fact that the state has an obligation to promote public convenience and prosperity, and that this obligation may include preserving a valuable natural resource within the states' boundaries. Therefore, it is arguably a legitimate exercise of the state police power for the legislature to determine if the exportation of state waters is within the public welfare. [16]

On the other hand, a court could well decide that it is an unreasonable burden upon and interference with interstate commerce to require any prospective diverter of a state's water for use outside the state to get legislative approval. The protection and preservation of waters within the state can be accomplished within the framework of existing statutes without imposing the additional burden of going to the state legislature for approval. Thus, there are typically statutory instructions to state water rights administrators to protect and assure the maximum permanent beneficial use of state waters. Therefore, it may be argued that the burden of requiring legislative approval only for potential uses outside the state serves only to duplicate procedures and requirements already provided for by statute and therefore does not confer a local benefit which may be deemed to outweigh any competing national interests underlying the congressional power to regulate interstate commerce. [17]

Prohibition Against Water Exportation Without Reciprocal Rights From The Benefiting State

The local interest versus the national interest problem is also important in assessing the constitutionality of a prohibition against the appropriation, storage, or diversion of the water of the state for use outside the state without reciprocal rights being granted by the recipient state. On the one hand, the argument may be made that the activity which the statute seeks to regulate bears such a close and substantial relation to interstate commerce that it is essential and appropriate for Congress to exercise control over the activity in order to protect commerce from burdensome obstructions. In such case, it is irrelevant that Congress has failed to enact legislation in the particular area. The statute purports to exercise the very power granted to Congress. The motivation behind this provision could be construed to be simply the commercial conservation and preservation of the natural resource and therefore defective in the same sense as a statute purporting to permit a state to keep its corn, wheat, cotton, fruit, lead, iron, and petroleum within its borders. To permit this would be to permit the destruction of interstate commerce. And yet, arguably, it is just exactly this kind of thing which such a provision appears to do. [18]

On the other hand, it may be argued in the first place that the granting of permits for use of water outside the state, absent reciprocal rights from the benefiting state, is not in the public interest. Availability of water in sufficient quantities is essential for social and economic development. Water taken out of the state to develop industry, agriculture or other forms of economic activity elsewhere deters or denies similar activity in the state. Thus, it would seem reasonable to require reciprocal rights so that an alternative source of water is available should the need arise. Moreover, in addition to this local interest, it would not seem that the provision requiring reciprocity is injurious to the national interest in regulating interstate commerce. It would not seem to be in the national interest to require one state to sacrifice its natural resources in order to promote the economic growth of a sister state. It is also arguable that any adverse effect on interstate commerce is only incidental and indirect in view of the local benefits the provision is designed to achieve.

Prohibition Against The Use Of State Waters To Transport Minerals, Chemicals, Or Other Products Out Of The State Without The Prior Approval Of The Legislature.

It can be said on behalf of this provision that the prohibition does not prevent transportation of minerals, chemicals or other products out of the state by more conventional means. Neither does the statute prevent items of commerce from moving into the state. Furthermore, the statute does not prevent these items from being exported out of the state on the navigable waterways of the state. Rather, it can be argued that the statute simply implies that the use of its water as a conduit for moving other natural resources or products out of the state is not a per se beneficial use of the state's water. Therefore, before such a use will be permitted, the legislature, upon the advice of the state engineer, will have to determine if such a proposed use is beneficial. In supporting this argument, it could be pointed out that the state should have considerable leeway in analyzing local evils and in prescribing appropriate cures. So long as the local benefit which the statute is designed to achieve outweighs the minor inconvenience, the statute must be seen as a legitimate exercise of the police power. The commerce clause does not require the state to yield to the mere convenience and advantage of particular industries when it may reasonably consider conservation to be of paramount importance. 19/

On the other hand, the provision can be attacked as a restriction with respect to a medium of transportation to another state and therefore clearly an instrumentality of commerce subject to the reach of the commerce clause. The attempt to place restrictions upon the use of state waters as a medium of transportation of products out of the state could be seen as an unconstitutional interference with and burden upon interstate commerce. In the first place, since the state cannot impose similar restrictions upon trains moving in interstate commerce, it could be argued that it should not be able to impose them upon water when it is to be used as a medium of transportation moving in interstate commerce. Secondly, the restriction upon the use of water as a means of interstate transportation could be considered inherently discriminatory. It is entirely possible that state waters may be used as a medium of transportation of mineral, chemical or other products within a state without requiring legislative approval, and without substantial justification. Thus, the burden on interstate commerce could be seen as clearly excessive in relation to the local benefits the restriction purports to assure.

Conclusion

There are currently two views as to the constitutionality of state prohibitions or restrictions on the export of state waters. The first view is that of the *McCarter* case which gave the state broad control over its water even where interstate commerce is involved. The other view is that of the *Altus* case which, although limited in its holding, proposed treating water like any other natural resource so that a state could not restrict its use in interstate commerce to any greater degree than with respect to any other natural resource. In view of the limited holding in the *Altus* case, it should not be considered as overruling *McCarter*. However, in view of the evolution of the Supreme Court cases involving the commerce power, it may be unrealistic to assume the virtually unlimited control envisioned by *McCarter*. Rather, any statute seeking to restrict or prohibit the movement of waters found entirely within a state's boundaries should be considered in light of current doctrine relative to interstate commerce and the reach of the commerce clause.

With this view in mind, each of the typical provisions discussed above could come under attack as an unreasonable interference with interstate commerce. The provision prohibiting the use of state waters as a medium to transport minerals, chemicals or other products without legislative approval seems the most vulnerable. On the other hand, water is a unique natural resource which has traditionally been treated specially by both the federal and state governments and the courts and such special treatment should justify the states placing greater burdens upon interstate commerce for the purpose of protecting the public welfare of its residents without violating the commerce clause.[20] Nevertheless, we can only speculate as to the outcome of a court review of these provisions. It seems clear, however, that their constitutionality cannot now be taken for granted.[21]

FOOTNOTES

1. *See* Comment, *"Its Our Water!" - Can Wyoming Constitutionally Prohibit the Exportation of State Waters?,* Vol. X, No. 1 Land and Water L. Rev. 119 (1975).

2. *E.g.*, Sec. 89-846, R.C.M. (1947) (Mont.).

3. *E.g.*, Utah Code Ann., Sec. 73-2-8 (1953).

4. Sec. 89-867, R.C.M. (1947) (Mont.).

5. Wyoming Statutes, Sec. 41-10.5 (b) (1957).

6. 209 U.S. 349 (1908).

7. *Id.* at 353.

8. *Id.*

9. 255 F. Supp. 828 (W.D.Tex. 1966).

10. 385 U.S. 35 (1966).

11. Altus v. Carr, 255 F. Supp. 828, 830 (W.D. Tex. 1966).

12. *Id.* at 840.

13. Comment, *supra* note 1, at 122.

14. Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229, 258-60 (1910).

15. *See id.*

16. Comment, *supra* note 1,at 124

17. *Id.* at 144.

18. Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229, 255 (1910); Pennsylvania v. West Virginia, 262 U.S. 533 (1922).

19. Corsa v. Tawes, 149 F. Supp. 771, 776 (D. Md. 1957), *aff'd,* 355 U.S. 37 (1957).

20. Professor Charles Corker of the University of Washington Law School concludes in an article written for the Idaho Law Review as follows: "Interstate 'commerce' may or may not be involved, but if it is, nondiscriminatory legislation is likely to survive if it has a clear and demonstrable relation to any state purpose - preserving Idaho rivers for salmon, for recreationists, for irrigators, or for cities wherever located." C.E. Corker, *Can A State Embargo the Export of Water by Transbasin Diversion?*, 12 Idaho L.Rev. 135 (1976).

21. Of course, it seems clear that a state cannot forbid an export of water authorized by Congress. *See id.* at 137 - 146.

BRUCE BABBITT
GOVERNOR

OFFICE OF THE GOVERNOR
STATE HOUSE
PHOENIX, ARIZONA 85007

IN REPLY
REFER TO:

October 7, 1982

The Honorable James Abdnor
Chairman, Subcommittee on Water Resources
Committee on Environment and Public Works
U.S. Senate
4204 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Chairman Abdnor:

This will transmit a brief statement for the record of the Subcommittee's hearings on Sporhase v. Nebraska, ex rel. Douglas. These comments indicate the interest and concerns of the National Governors' Association in light of the Sporhase decision.

As chairman of the National Governors' Subcommittee on Water Management, I want to express the Governors' willingness to work with your Subcommittee to insure that states continue to have the primary authority and responsibility for water management.

Sincerely,

Bruce Babbitt
Governor
Chairman, National Governors'
Association
Subcommittee on Water Management

BB:dpb

Enclosure

STATEMENT FOR THE RECORD ON
SPORHASE v. NEBRASKA, ex rel. DOUGLAS

FOR SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE
SUBCOMMITTEE ON WATER RESOURCES
September 15, 1982 Hearings

The National Governors' Association (NGA) thanks the Members of the Senate Environment and Public Works Subcommittee on Water Resources for this opportunity to submit comments for the record on the Supreme Court's decision in Sporhase v. Nebraska, ex rel. Douglas, 102 S. Ct. 3456 (1982). As Chairman of the National Governors' Association Subcommittee on Water Management, I would like to appraise the Members of the Subcommittee of NGA's interest and concern over the issues raised by this decision.

The Sporhase Decision

As Members of the Subcommittee are aware, the Supreme Court in Sporhase held that groundwater is an article of commerce and therefore subject to Congressional regulation. The Court also held that although Congress has not enacted legislation governing water rights, it is not precluded from doing so in the future.

At the same time the Court did conclude that state regulation of water usage is at the core of its police power, and a state may demonstrate a limited preference for its own citizens in water allocation decisions.

Implications of Sporhase Decision

Previous Supreme Court decisions including Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908) and United States v. California, 438 U.S. 645 (1978) have emphasized federal deference to state water allocation laws. There are 37 federal statutes as well as numerous interstate compacts which demonstrate Congressional deference to state water law.

However, the Sporhase decision is troubling in that it may lay the groundwork for reversing the primary role of States in allocating the uses to which waters may be put. In spite of statements in the decision which acknowledge state water rights, the potential clearly exists for erosion of state authority.

Because of the Court's finding that the Nebraska reciprocity clause is unconstitutional, the Sporhase decision will cause states, particularly in the West, to examine their statutes for similar provisions and attempt to make appropriate changes. Testimony presented to this Subcommittee by the Western States Water Council indicates that many states have some type of statutory restriction or prohibition on the transfer of water out of state, including Idaho, California and Washington. The decision indicates that state restrictions must bear a direct relationship to conservation and preservation of water resources and all other restrictions may be subject to "closest scrutiny" in case they be impermissible burdens on interstate commerce.

NGA Water Policies

The Governors have developed a comprehensive policy position "Fundamental Principles for a National Water Policy." This policy and a subsequent separate policy "Principles for a Groundwater Policy" reiterate the concern of the nation's Governors that "the states have the primary authority and responsibility for water management".

> "Primary authority and responsibility for water management functions, including planning, development, and regulation, rest with the states and, in some cases, their delegated interstate agencies. Water management activities relating to water quality, water supply, groundwater, wetland protection, coastal zone management, and soil conservation should be clearly delineated by Congress as the primary responsibility of the states and their delegated interstate agencies."

> "To the degree appropriate, navigation, flood control, and other issues should continue to be shared with the federal government at the prerogative of the state."

> "Federal policy must recognize and respect the rights of the states to administer their individual water laws and manage their water resources."

The NGA groundwater policy supports the development of "a national policy to guide the actions of federal agencies as they administer programs which affect groundwater." It further states that all federal agencies having responsibilities for some aspect of groundwater management should be involved with State, local and interstate governmental units in developing this national groundwater policy.

NGA Concerns

In summary, the National Governors' Association is concerned about possible ramifications of the Sporhase decision because:

- It may provide a precedent for future federal preemption of state authority over water allocation decisions;
- It could initiate pressure for federal definition of federal/state/local water rights;
- It has been interpreted as a repudiation of state claims to the sovereign title to intrastate waters; and
- It creates uncertainty over the adequacy of existing state authorities over state water rights. Even without further delineation of the decision, states will likely begin seeking statutory changes.

Future NGA Actions

NGA cannot immediately recommend to the Subcommittee a specific course of action in response to Sporhase. The Governors, through the NGA Subcommittee and working in conjunction with other appropriate water resource organizations, will be examining further the implications of Sporhase for state water rights. The Governors' next policy-making meeting is in February of 1983, the Sporhase decision and related issues will be a key topic. We request the opportunity to work with your Subcommittee prior and subsequent to that meeting.

This is a very difficult and complex issue and one that should be approached cautiously. Resolution of the El Paso v. Reynolds, Civil No. 80-730-M (D. N.M., filed Sept. 5, 1980) case may provide a clearer understanding of the full import of the Sporhase decision. I would concur with some of the concerns stated by United States Assistant Attorney General Carol Dinkins in her testimony before the Subcommittee that "the mere attempt by Congress to define which types of state restrictions are proper and which are not, would amount, ironically, to the very type of federal legislation which proponents of state water rights have historically opposed."

Thank you for this opportunity to present the comments of the National Governors' Association on the Sporhase v. Nebraska decision.

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September 30, 1982

The Honorable James Abdnor, Chairman
Committee on Environment and Public Works
Subcommittee on Water Resources
4204 Dirkson Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

On September 15, 1982, the Subcommitte on Water Resources held a hearing to gather information concerning the Supreme Court's recent decision in *Sporhase v. Nebraska*. The Public Service Board of the City of El Paso, Texas is seeking access to locally abundant groundwater immediately across the state line in Dona Ana County, New Mexico. For this reason, El Paso participated in *Sporhase* as amicus curiae and continues to be vitally interested in the issue of interstate water transfers. Accordingly, we are submitting for your consideration and inclusion in the hearing record a brief paper prepared by the Public Service Board outlining the water supply alternatives faced by the City of El Paso.

The Public Service Board appreciates this opportunity to submit its views on the important issue of access to water resources. In the event that additional hearings on this issue are scheduled by the Subcommittee in the future, the Public Service Board would be pleased to testify regarding the situation of El Paso and the surrounding region.

Sincerely,

VINSON & ELKINS

Colin D. Mathews

Colin D. Mathews

Attorneys for the Public
Service Board of the
City of El Paso

Enclosure

WATER SUPPLY ALTERNATIVES FOR EL PASO: AN OVERVIEW

El Paso is one of the nation's largest and fastest growing cities. It is located, however, in a chronically water short region and faces long-term water shortages. El Paso is taking major steps to secure its water supplies in an intelligent, forward looking fashion.

El Paso is the economic capital of the Rio Grande Basin, which extends along the river valley 255 miles from Elephant Butte Reservoir in New Mexico to Ft. Quitman gaging station in Texas (Exhibit A). The Basin has a population of approximately 1.3 million people; about 450,000 live in El Paso and 750,000 live across the river in Juarez, Republic of Mexico. The Basin also contains more than 200,000 irrigated acres.

El Paso accounts for 85% of the value of production and 82% of employment in the region on the American side of the river. El Paso is an interstate and international trading and transportation center. More than a billion dollars worth of goods enter or leave the El Paso customs district each year. The traditional agricultural economy of the region accounts for about 5% of the value of production and employment in the region, and is considered important to the area's lifestyle and environment.

The sources and characteristics of El Paso's present water supply are listed below. Groundwater from one aquifer, the Hueco Bolson, is the principal resource used. It is the only source from which production could be substantially expanded in the short-term. However, pumping of the Hueco Bolson is causing the water table to drop at rates of up to three feet per year in El Paso and up to ten feet per year in Juarez. Thus the aquifer is already being depleted (mined) at a rapid rate. Increased pumping will only hasten its depletion.

SOURCES OF EL PASO'S WATER SUPPLY

Source	Present supply acre-feet/yr	Characteristics
Rio Grande	10,000	Requires treatment. Available in summer only. Subject to droughts. Increased use would be subject to Federal involvement.
Canutillo Wells	25,000	Shallow water is saline and usable only through blending. Yield can be maintained indefinitely if pumping is not increased; more rapid pumping would cause rapid drawdown.
Hueco Bolson	60,000	Excellent, good quality resource. Expansion of well field after year 2000 subject to Federal control. Aquifer projected to near exhaustion around 2050.

Source: Public Service Board of El Paso

The combination of a sunbelt and border location and substantial military and other federal presence assures continued population growth in both El Paso and Juarez. This will increase demands for municipal water. Initial problems with production from the Hueco Bolson will be experienced as early as the turn of the century, due to the fact that many potential well sites are under military control (Ft. Bliss) and are not available to the City. Even assuming this problem is solved, production rates will decline and water quality will deteriorate long before final depletion. If population increases as expected and alternative water supplies are not developed, the Hueco Bolson supply will be completely exhausted in the middle of the 21st Century.

For all these reasons, even though depletion of the Hueco Bolson is a long-range problem which requires long-range solutions, El Paso cannot afford to wait until there is an actual water crisis. El Paso is taking immediate action to help secure water to meet its needs.

Water conservation and recycling plays a major role in El Paso's efforts to solve its water needs. This program will cost more than $7 million per year by the mid-1980's, when all proposed recycling projects come on line. Water savings will approach one-third of the annual demand.

Of special interest is the $30 million Hueco Bolson Recharge Project. This project will utilize innovative technology to reclaim sewage to meet drinking water standards and inject the water into the Hueco Bolson where it will become part of the City's public water supply. The project is this nation's first large-scale commitment to the potable recycling of municipal wastewater. The project is funded about equally by EPA and the City. EPA support for the project was expressly based on recognition of El Paso's critical need to augment its long-term water supplies.

While water conservation is essential in El Paso, it only postpones the date at which the Hueco Bolson will be depleted. Conservation alone is not a total long-range solution. Because the aquifer receives almost no recharge, its ultimate exhaustion is inevitable so long as El Paso continues its role as the economic center of a growing region. Therefore the City must consider new sources of water to meet prospective demands. Exhibit B shows the location of major reserves of fresh and saline water in the vicinity of the City. Exhibit C characterizes each of these sources in terms of size, cost to El Paso of development, and considerations affecting potential development.

The sources described in Exhibits B and C fall into several categories.

First, there is the Rio Grande. The river is controlled by the Federal government, subject to international treaty, interstate compact, contracts with the United States and Water and Power Resources Service management of the Rio Grande Project. Moreover, all river water is already appropriated, primarily for agricultural use.

Second, there is El Paso's Canutillo well field along the Rio Grande and the New Mexico state line. This field is presently utilized as a steady-state resource, with recharge balancing withdrawal. Expansion is not feasible without disrupting the balance and severely diminishing the long-term value of the well field.

Third, the rate of withdrawal of the Hueco Bolson in Texas can be expanded. In fact, if additional alternatives are not developed, this aquifer will be the major source of additional water for El Paso over the next 20 years. After that time additional expansion of the field would require use of water now under Federal control (Ft. Bliss). Of course, even at existing rates of use with no increase, the Hueco Bolson is being depleted. If the use of the Bolson could shift from that of a basic supply to that of a peak-season supply, the rate of depletion would be significantly slowed.

Fourth, there are slightly saline waters within the immediate area which can be blended with Bolson water. This approach could extend the life of the Hueco Bolson by as much as ten years. However, blending will affect taste, cause EPA drinking water standards to be exceeded, and cause users economic losses estimated to exceed $100/acre-foot. In addition, for quality reasons, this resource must be used gradually along with other, fresher waters. Finally, this approach depends upon El Paso being given access, presently denied, to federal military lands in Texas.

Fifth, there are poor quality water supplies (sewage, saline water) within the immediate area which can be developed at high cost and with substantial energy use and environmental impact.

Sixth, there are moderately sized reserves of fresh groundwater 100 to 150 miles east of El Paso in West Texas. This water is now being depleted for irrigation purposes. Use of this source would be costly, energy-intensive and entail substantial environmental impact.

Seventh, there is the saline water reservoir of the Tularosa Basin in New Mexico. This is the most expensive of the alternatives. It would require a massive, federally subsidized desalinization and pipeline project.

Finally, there is Mesilla Bolson and Hueco Bolson groundwater in New Mexico, adjacent to the El Paso city limits. A New Mexico statute states that export of this water is not permitted, but El Paso believes the New Mexico statute is unconstitutional and has filed suit seeking a declaration that the statute is unconstitutional.

New Mexico law also requires anyone planning new appropriations of groundwater to obtain permits from the State Engineer in administrative proceedings. El Paso has filed applications to make appropriations in both the Mesilla Bolson and the Hueco Bolson. The State Engineer has suspended hearings on the applications pending the constitutional litigation over the export prohibitions.

Despite El Paso's leadership in the development of intensive water conservation and recycling programs, the city's ability to survive and continue as a center of productive economic activity will depend on its ability to secure a portion of its future water supply from groundwater sources in New Mexico. Legislative proposals currently pending in Congress to create new obstacles to interstate water transfers are thus a threat to the continued vitality of the city and the region.

EXHIBIT A

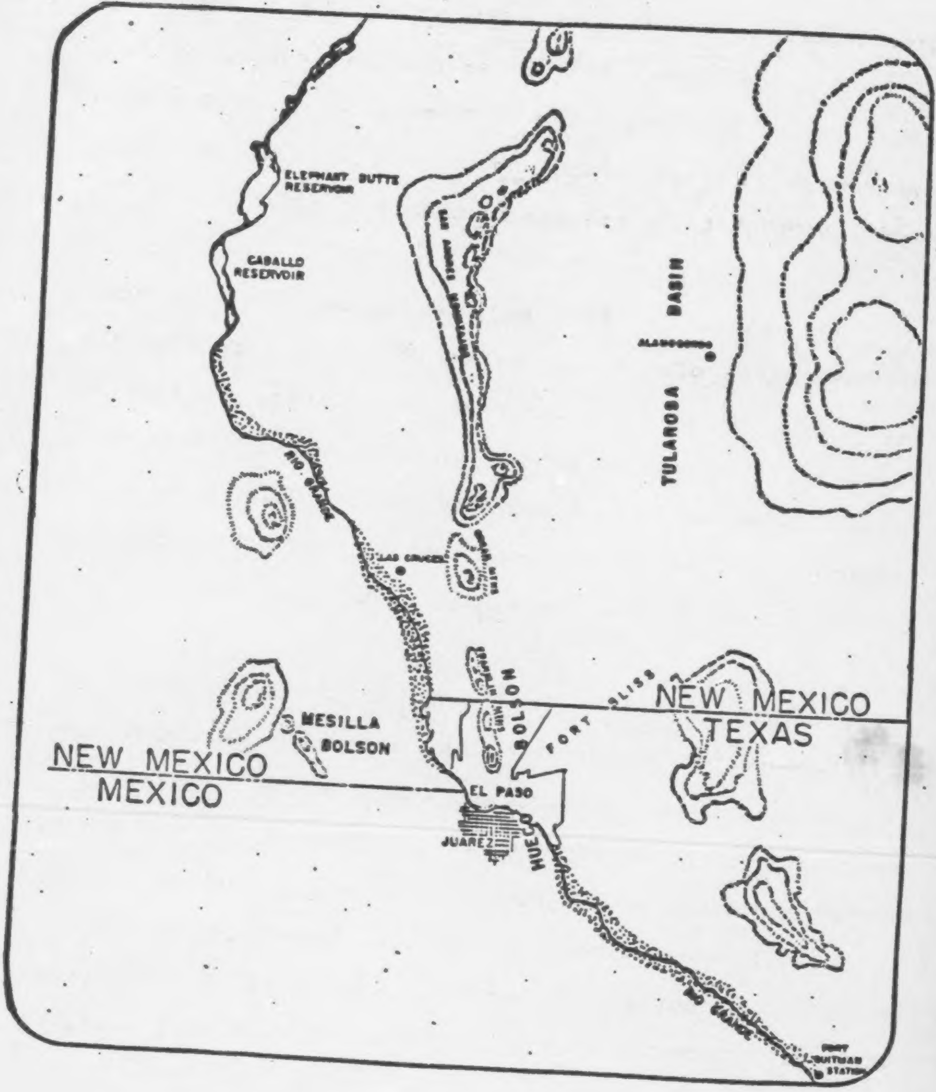
ELEPHANT BUTTE RESERVOIR
CABALLO RESERVOIR
TULAROSA BASIN
ALAMOGORDO
RIO GRANDE
LAS CRUCES
BOLSON
FORT BLISS
NEW MEXICO
TEXAS
MESILLA BOLSON
NEW MEXICO
MEXICO
EL PASO
JUAREZ
HUECO
RIO GRANDE
FORT QUITMAN STATION

EXHIBIT B

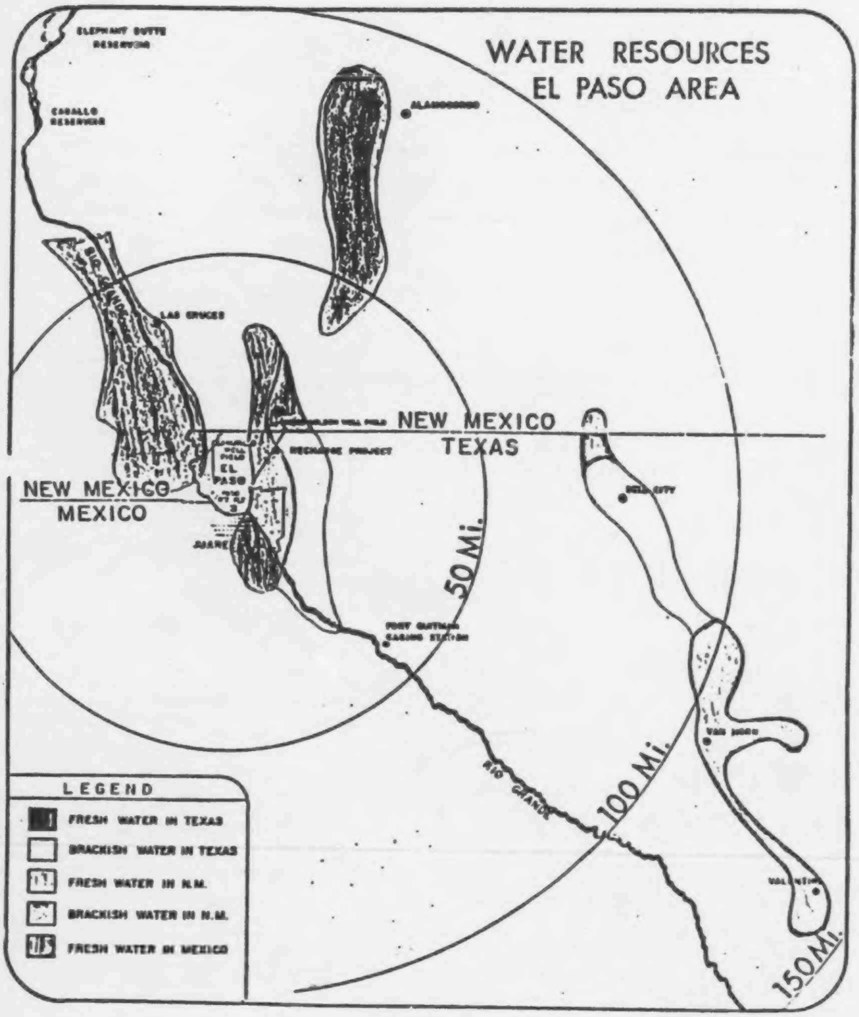
WATER RESOURCES
EL PASO AREA
ELEPHANT BUTTE RESERVOIR
CABALLO RESERVOIR
ALAMOGORDO
RIO GRANDE
LAS CRUCES
WELL FIELD
NEW MEXICO
TEXAS
RECHARGE PROJECT
WELL FIELD
EL PASO
NEW MEXICO
MEXICO
JUAREZ
50 Mi.
FORT QUITMAN GAGING STATION
DELL CITY
VAN HORN
100 Mi.
RIO GRANDE
VALENTINE
150 Mi.
LEGEND
FRESH WATER IN TEXAS
BRACKISH WATER IN TEXAS
FRESH WATER IN N.M.
BRACKISH WATER IN N.M.
FRESH WATER IN MEXICO

EXHIBIT C

WATER SUPPLY ALTERNATIVES FOR EL PASO.

AFY = Acre-feet per year. AF = acre-feet.

Source	Quantity	Cost $ per AF	Considerations
Increased diversions from Rio Grande	100,000 AFY	230	Federal control
Expand Canutillo well field	none		Expansion would deplete what is now an excellent renewable resource
Expand Hueco Bolson	10,000,000 AF	100	Expansion after 2000 would require use of water under Federal control; continued heavy pumping will exhaust aquifer
Recycle sewage into municipal water system	60,000 AFY	400	Energy and chemical-intensive; all additional recycling would require drinking water use (with uncertain health effects) and would reduce water supply available to irrigated agriculture
Blending of slightly saline ground water	3,200,000 AFY	100	Quality of the water supply would deteriorate; Federal control
Desalinization of local brines	Unknown but large	800 +	Extremely energy-intensive; requires brine disposal; poor well yields
Importation of water from Trans-Pecos now, West Texas	3,000,000 + AF	500	Energy-intensive pumping; major construction impacts; would require retirement of irrigated lands
Ground water in adjacent parts of New Mexico	40,000,000 + AF	300	Federal control; need to consider economic, environmental effects
Saline ground water, New Mexico	Unknown but large	1800 +	Extremely energy-intensive; requires brine disposal; poor well yields

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SPORHASE ET AL. *v.* NEBRASKA EX REL. DOUGLAS, ATTORNEY GENERAL

APPEAL FROM SUPREME COURT OF NEBRASKA

No. 81-613. Argued March 30, 1982—Decided July 2, 1982

A Nebraska statute requires any person intending to withdraw ground water from any well located in the State and transport it for use in an adjoining State, to obtain a permit from the Nebraska Department of Water Resources. If the Director of Water Resources finds that such withdrawal is reasonable, not contrary to the conservation and use of ground water, and not otherwise detrimental to the public welfare, he will grant the permit if the State in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that State for use in Nebraska. Appellants own contiguous tracts of land in Nebraska and Colorado, on which a well on the Nebraska tract pumps ground water for irrigation of both the Nebraska and Colorado tracts, but they never applied for the permit required by the statute. Appellee brought an action in a Nebraska state court to enjoin appellants from transferring the water across the border without a permit. Rejecting the defense that the statute imposed an undue burden on interstate commerce, the trial court granted the injunction. The Nebraska Supreme Court affirmed.

Held:

1. Ground water is an article of commerce and therefore subject to congressional regulation. Pp. 3-11.

(a) Although appellee's claimed greater ownership interest in ground water than in certain other natural resources may not be irrelevant to Commerce Clause analysis, it does not remove Nebraska ground water from such scrutiny, since appellee's argument is still based on the legal fiction of state ownership. Pp. 3-10.

(b) The States' interests in conserving and preserving scarce water resources in the arid Western States clearly have an interstate dimension. The agricultural markets supplied by irrigated farms provide the archtypical example of commerce among the States for which the Framers of the Constitution intended to authorize federal regulation. Here, the multistate character of the aquifer underlying appellants' tracts of land, as well as parts of Texas, New Mexico, Oklahoma, and Kansas, demonstrates that there is a significant federal interest in conservation as well as in fair allocation of diminishing water resources. Pp. 10–11.

2. The reciprocity requirement of the Nebraska statute violates the Commerce Clause as imposing an impermissible burden on interstate commerce. While the first three conditions set forth in the statute for granting a permit—that the withdrawal of the ground water be reasonable, not contrary to the conservation and use of ground water, and not otherwise detrimental to the public welfare—do not on their faces impermissibly burden interstate commerce, the reciprocity provision operates as an explicit barrier to commerce between Nebraska and its adjoining States. Nebraska therefore has the initial burden of demonstrating a close fit between the reciprocity requirement and its asserted local purpose. Such requirement, when superimposed on the first three restrictions, fails to clear this initial hurdle, since there is no evidence that it is narrowly tailored to the conservation and preservation rationale. Thus, it does not survive the "strictest scrutiny" reserved for facially discriminatory legislation. Pp. 12–16.

3. Congress has not granted the States permission to engage in ground water regulation that would otherwise be impermissible. Although there are 37 federal statutes and a number of interstate compacts demonstrating Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional restraints on such state law. Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal water projects nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. Pp. 16–18.

208 Neb. 703, 305 N. W. 2d 614, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which O'CONNOR, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-613

JOY SPORHASE AND DELMER MOSS, ETC., APPELLANTS *v.* NEBRASKA, EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL

APPEAL FROM THE SUPREME COURT OF NEBRASKA

[July 2, 1982]

JUSTICE STEVENS delivered the opinion of the Court.

Appellants challenge the constitutionality of a Nebraska statutory restriction on the withdrawal of ground water from any well within Nebraska intended for use in an adjoining State. The challenge presents three questions under the Commerce Clause:[1] (1) whether ground water is an article of commerce and therefore subject to Congressional regulation; (2) whether the Nebraska restriction on the interstate transfer of ground water imposes an impermissible burden on commerce; and (3) whether Congress has granted the States permission to engage in ground water regulation that otherwise would be impermissible.

Appellants jointly own contiguous tracts of land in Chase County, Nebraska, and Phillips County, Colorado. A well physically located on the Nebraska tract pumps ground water for irrigation of both the Nebraska tract and the Colorado tract. Previous owners of the land registered the well with the State of Nebraska in 1971, but neither they nor the present owners applied for the permit required by § 46-613.01 of the Nebraska Revised Statutes. That section provides:

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[1] Article I, § 8, cl. 3 of the United States Constitution provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." For general explanations of Commerce Clause analysis, see, *e. g.*, *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U. S. 648, 652–653 (1981); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 766–770 (1945).

> "Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska."

Appellee brought this action to enjoin appellants from transferring the water across the border without a permit.[2] The trial court rejected the defense that the statute imposed an undue burden on interstate commerce and granted the injunction. The Nebraska Supreme Court affirmed. 208 Neb. 703, 305 N.W. 2d 614 (1981). It held that, under Nebraska law, ground water is not "a marketable item freely transferable for value among private parties, and therefore [is] not an article of commerce." *Id.*, at 705, 305 N.W. 2d, at 616.[3] The Chief Justice, while agreeing that the statutory criteria governing the transfer of water to an adjoining State did not violate the Commerce Clause, dissented on the narrow ground that appellee violated both the Federal and Nebraska Constitutions by attempting "to absolutely prohibit the transfer of water, without regard to its need or availability, based solely upon the acts of another state over which citizens of this state have no control." *Id.*, at 713, 305 N.W. 2d, at 620.

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[2] Because of the reciprocity requirement of § 46-613.01, appellants would not have been granted a permit had they applied for one. Their failure to submit an application therefore does not deprive them of standing to challenge the legality of the reciprocity requirement. Cf. *Larson* v. *Valente*, —— U. S. —— (1982).

[3] The Nebraska Supreme Court also rejected appellants' equal protection and due process challenges. Appellants renew those challenges before this Court, but we need not reach these issues in light of our dispo-

I

In holding that ground water is not an article of commerce, the Nebraska Supreme Court and appellee cite as controlling precedent *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349 (1908). In that case a New Jersey statute prohibited the interstate transfer of any surface water located within the State.[4] The Hudson County Water Company nevertheless contracted with New York City to supply one of its boroughs with water from the Passaic River in New Jersey. The state attorney general sought from the New Jersey courts an injunction against fulfillment of the contract. Over the water company's objections that the statute impaired the obligation of contract, took property without just compensation, interfered with interstate commerce, denied New York citizens the privileges afforded New Jersey citizens, and denied New York citizens the equal protection of the laws, the injunction was granted. This Court, in an opinion by Justice Holmes, affirmed.

Most of the Court's opinion addresses the just compensation claim. Justice Holmes refused to ground the Court's holding, as did the New Jersey state courts,[5] on "the more or

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sition of the Commerce Clause claim.

[4] The Court quoted the statute: "It shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river or stream of this State into any other State, for use therein." 209 U. S., at 353.

[5] "The Courts below assumed or decided and we shall assume that the

less attenuated residuum of title that the State may be said to possess." *Id.*, at 355. For the statute was justified as a regulatory measure that, on balance, did not amount to a taking of property that required just compensation. Putting aside the "problems of irrigation," the State's interest in preserving its waters was well within its police power.[6] That interest was not dependent on any demonstration that the State's water resources were inadequate for present or future use. The State "finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will." *Id.*, at 357.

Having disposed of the just compensation claim, Justice Holmes turned very briefly to the other constitutional challenges. In one paragraph, he rejected the Contract Clause claim. In the remaining paragraph of the opinion, he rejected all the other defenses. His treatment of the Commerce Clause challenge consists of three sentences: "A man

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defendant represents the rights of a riparian proprietor, and on the other hand, that it represents no special chartered powers that give it greater rights than those. On these assumptions the Court of Errors and Appeals pointed out that a riparian proprietor has no right to divert waters for more than a reasonable distance from the body of the stream or for other than the well-known ordinary uses, and that for any purpose anywhere he is narrowly limited in amount. It went on to infer that his only right in the body of the stream is to have the flow continue, and that there is a residuum of public ownership in the State. It reinforced the State's rights by the State's title to the bed of the stream where flowed by the tide, and concluded from the foregoing and other considerations that, as against the rights of riparian owners merely as such, the State was warranted in prohibiting the acquisition of the title to water on a larger scale." *Id.*, at 354.

[6] "The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use." *Id.*, at 356.

cannot acquire a right to property by his desire to use it in commerce among the States. Neither can he enlarge his otherwise limited and qualified right to the same end. The case is covered in this respect by *Geer* v. *Connecticut*, 161 U. S. 519 [(1896)]." 209 U. S., at 357.

While appellee relies upon *Hudson County*, appellants rest on our summary affirmance of a three-judge district court judgment in *City of Altus* v. *Carr*, 255 F.Supp. 828 (W.D. Tex.), aff'd mem., 385 U. S. 35 (1966). The City of Altus is located near the southern border of Oklahoma. Large population increases rendered inadequate its source of municipal water. It consequently obtained from the owners of land in an adjoining Texas county the contractual right to pump the ground water underlying that land and to transport it across the border. The Texas legislature thereafter enacted a statute that forbade the interstate exportation of ground water without the approval of that body.[7] The City filed suit in federal district court, claiming that the statute violated the Commerce Clause.

The City relied upon *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229 (1910), which invalidated an Oklahoma statute that prevented the interstate tranfer of natural gas produced within the State,[8] and *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), which invalidated a West Virginia statute that accorded a preference to the citizens of that State in the purchase of natural gas produced therein.[9] The Texas attorney general defended the statute on two grounds. First, he asserted that its purpose was to conserve and protect the State's water resources by regulating the withdrawal of ground water. The district court rejected that defense because similar conservation claims had met defeat in *West* v. *Kansas Natural Gas Co., supra*, and *Pennsylvania* v. *West Virginia, supra.*[10] Second, the State argued that the statute regulated ground water and that ground water is not an article of commerce, citing *Geer* v. *Connecticut, supra*, and *Hudson County, supra.* The court rejected this argument since the statute directly regulated the interstate transportation of water that had been pumped from the ground, and under Texas law such water was an article of commerce. The court then had little difficulty in concluding that the statute imposed an impermissible burden on interstate commerce.[11]

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[7] The district court quoted the statute: "No one shall withdraw water from any underground source in this State for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it." 255 F.Supp., at 830.

[8] Justice Holmes, the author of the Court's opinion in *Hudson County*, noted his dissent. See 221 U. S., at 262.

[9] Justice Holmes dissented, expressing the view that the Court's decision was inconsistent with *Hudson County*. See 262 U. S., at 603.

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[10] The district court opinion, 255 F.Supp., at 839, included these quotations from the two cases:

"The statute of Oklahoma recognizes [natural gas] to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the state, as coal might be, or timber. Both of these products might be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a state would confine them to the inhabitants of the state. If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle?" *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 255 (1910).

"Another consideration advanced to the same end is that natural gas is a natural product of the state and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the act is therefore a legitimate measure of conservation in the interest of the people of the state. If the situation be as stated, it affords no ground for the assumption by the state of the power to regulate interstate commerce, which is what the act attempts to do. That power is lodged elsewhere." *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 598 (1923).

[11] "Considering the statute in question only with regard to whether it

In summarily affirming the district court in *City of Altus*, we did not necessarily adopt the court's reasoning. Our affirmance indicates only our agreement with the result reached by the district court. *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490, 499 (1981). That result is not necessarily inconsistent with the Nebraska Supreme Court's holding in this case. For Texas law differs significantly from Nebraska law regarding the rights of a surface owner to ground water that he has withdrawn. According to the district court in *City of Altus*, the "rule in Texas was that an owner of land could use all of the percolating water he could capture from the wells on his land for whatever beneficial purposes he needed it, on or off the land, and could likewise sell it to others for use on or off the land and outside the basin where produced, just as he could sell any other species of property." 255 F.Supp., at 833, n. 8. Since ground water, once withdrawn, may be freely bought and sold in States that follow this rule, in those States ground water is appropriately regarded as an article of commerce. In Nebraska the surface owner has no comparable interest in ground water. As explained by the Nebraska Supreme Court, "'the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in

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regulates the transportation and use of water after it has been withdrawn from a well and becomes personal property, such statute constitutes an unreasonable burden upon and interference with interstate commerce. Moreover, on the facts of this case it appear to us that [the Texas statute] does not have for its purpose, nor does it operate to conserve water resources of the State of Texas except in the sense that it does so for her own benefit to the detriment of her sister States as in the case of West v. Kansas Natural Gas Co. In the name of conservation, the statute seeks to prohibit interstate shipments of water while indulging in the substantial discrimination of permitting the unrestricted intrastate production and transportation of water between points within the State, no matter how distant; for example, from Wilbarger County to El Paso County, Texas. Obviously, the statute had little relation to the cause of conservation." 255 F.Supp., at 839–840.

excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole.'" 208 Neb., at 705, 305 N.W. 2d, at 617 (quoting *Olson* v. *City of Wahoo*, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933)).

City of Altus, however, is inconsistent with *Hudson County*. For in the latter case the Court found *Geer* v. *Connecticut*, *supra*, to be controlling on the Commerce Clause issue. *Geer*, which sustained a Connecticut ban on the interstate transportation of game birds captured in that State, was premised on the theory that the State owned its wild animals and therefore was free to qualify any ownership interest it might recognize in the persons who capture them. One such restriction is a prohibition against interstate transfer of the captured animals. This theory of public ownership was advanced as a defense in *City of Altus*. The State argued that it owned all subterranean water and therefore could recognize ownership in the surface owner who withdraws the water, but restrict that ownership to use of the water within the State. That theory, upon which the Commerce Clause issue in *Hudson County* was decided, was rejected by the district court in *City of Altus*.[12] In expressly overruling *Geer* three years ago, this Court traced the demise of the public ownership theory and definitively recast it as "'but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'" *Hughes* v. *Oklahoma*, 441 U. S. 322, 334 (1979) (quoting *Toomer* v. *Witsell*, 334 U. S. 385, 402 (1948)). See also *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U. S. 371, 384-387 (1978); *Douglas* v. *Seacoast Products, Inc.*, 431 U. S. 265, 284-285 (1977). In *Hughes* the Court found the State's interests insufficient to sustain a ban on the interstate transfer of natural minnows seined from waters within the State.

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[12] "This statute, however, seeks to prohibit the production of underground water for the purpose of transporting same in interstate commerce, and has the effect of prohibiting the interstate transportation of such water after it has become personal property. Whether a statute by its phraseology prohibits the interstate transportation of an article of commerce after it has become the personal property of someone as in the Pennsylvania and West cases, or prohibits the withdrawal of such substance where the intent is to transport such in interstate commerce, the result upon interstate commerce is the same. In both situations, the purpose and intent of the statute and the end result thereof is to prohibit the interstate transportation of an article of commerce." *Id.*, at 840.

Appellee insists, however, that Nebraska water is distinguishable from other natural resources. The surface owner who withdraws Nebraska ground water enjoys a lesser ownership interest in the water than the captor of game birds in Connecticut or minnows in Oklahoma or ground water in Texas, for in *Geer*, *Hughes*, and *City of Altus* the States permitted intrastate trade in the natural resources once they were captured. Although appellee's greater ownership interest may not be irrelevant to Commerce Clause analysis, it does not absolutely remove Nebraska ground water from such scrutiny. For appellee's argument is still based on the legal fiction of state ownership. The fiction is illustrated by municipal water supply arrangements pursuant to which ground water is withdrawn from rural areas and transferred to urban areas. Such arrangements are permitted in Nebraska, see *Metropolitan Utilities District* v. *Merritt Beach Co.*, 173 Neb. 783, 140 N.W. 2d 626 (1966), but the Nebraska Supreme Court distinguished them on the ground that the transferror was only permitted to charge as a price for the water his costs of distribution and not the value of the water itself. 208 Neb., at 708, 305 N.W. 2d, at 618. Unless demand is greater than supply, however, this reasoning does not distinguish minnows, the price of which presumably is derived from the costs of seining and of transporting the catch to market. Even in cases of shortage, in which the seller of the natural resource can demand a price that exceeds his costs, the State's rate structure that requires the price to be cost-justified is economically comparable to price regulation. A State's power to regulate prices or rates has never been thought to depend on public ownership of the controlled commodity. It would be anomalous if federal power to regulate economic transactions in natural resources depended on the characterization of the payment as compensation for distribution services, on the one hand, or as the price of goods, on the other. Cf. *In re Rahrer*, 140 U. S. 545, 558 (1891).

The second asserted distinction is that water, unlike other natural resources, is essential for human survival. Appellee, and the *amici curiae* that are vitally interested in conserving and preserving scarce water resources in the arid Western States, have convincingly demonstrated the desirability of state and local management of ground water.[13] But the States' interests clearly have an interstate dimension. Although water is indeed essential for human survival, studies indicate that over 80% of our water supplies is used for agricultural purposes.[14] The agricultural markets supplied by irrigated farms are worldwide. They provide the archtypical example of commerce among the several States for which the Framers of our Constitution intended to authorize federal regulation. The multistate character of the Ogallala aquifer—underlying appellants' tracts of land in Colorado and Nebraska, as well as parts of Texas, New Mexico, Oklahoma, and Kansas[15]—confirms the view that there is a significant federal interest in conservation as well as in fair allocation of this diminishing resource. Cf. *Arizona* v. *California*, 373 U. S. 546 (1963).

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[13] In *California* v. *United States*, 438 U. S. 645, 648 (1978), we explained some of the circumstances that support a general policy of local water management under differing legal systems:

"The very vastness of our territory as a Nation, the different times at which it was acquired and settled, and the varying physiographic and climate regimes which obtain in its different parts have all but necessitated the recognition of legal distinctions corresponding to these differences. Those who first set foot in North America from ships sailing the tidal estuaries of Virginia did not confront the same problems as those who sailed flat boats down the Ohio River in search of new sites to farm. Those who cleared the forests in the old Northwest Territory faced totally different physiographic problems from those who built sod huts on the Great Plains. The final expansion of our Nation in the 19th century into the arid lands beyond the hundredth meridian of longitude, which had been shown on early maps as the 'Great American Desert,' brought the participants in that expansion face to face with the necessity for irrigation in a way that no previous territorial expansion had."

The Western States' interests, and their asserted superior competence, in conserving and preserving scarce water resources are not irrelevant in the Commerce Clause inquiry. Nor is appellee's claim to public ownership without significance. Like Congress' deference to state water law, see *infra*, at 16–18, these factors inform the determination whether the burdens on commerce imposed by state ground water regulation are reasonable or unreasonable. But appellee's claim that Nebraska ground water is not an article of commerce goes too far: it would not only exempt Nebraska ground water regulation from burden-on-commerce analysis, it also would curtail the affirmative power of Congress to implement its own policies concerning such regulation. See *Philadelphia* v. *New Jersey*, 437 U. S. 617, 621–623 (1978). If Congress chooses to legislate in this area under its commerce power, its regulation need not be more limited in Nebraska than in Texas and States with similar property laws.

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[14] Soil Conservation Service, U. S. Dept. of Agriculture, America's Soil and Water: Conditions and Trends 21 (1980).

[15] Comptroller General, Ground Water Overdrafting Must Be Controlled 7–8 (1980).

Ground water overdraft is a national problem and Congress has the power to deal with it on that scale.

II

Our conclusion that water is an article of commerce raises, but does not answer, the question whether the Nebraska statute is unconstitutional. For the existence of unexercised federal regulatory power does not foreclose state regulation of its water resources, of the uses of water within the State, or indeed, of interstate commerce in water. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 766–767 (1945); *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 548–549 (1944); *Cooley* v. *Board of Wardens*, 12 How. 299, 319 (1851). Determining the validity of state statutes affecting interstate commerce requires a more careful inquiry:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970) (citation omitted).

The only purpose that appellee advances for § 46–613.01 is to conserve and preserve diminishing sources of ground water. The purpose is unquestionably legitimate and highly important,[16] and the other aspects of Nebraska's ground water regulation demonstrate that it is genuine. Appellants' land in Nebraska is located within the boundaries of the Upper Republican Ground Water Control Area, which was designated as such by the Director of the Nebraska Department of Water Resources based upon a determination "that there is an inadequate ground water supply to meet present or reasonably foreseeable needs for beneficial use of such water supply." Neb. Rev. Stat. § 46-658(1); see App. 56-60. Pursuant to § 46-666(1), the Upper Republican Natural Resources District has promulgated special rules and regulations governing ground water withdrawal and use. See App. 61-82. The rules and regulations define as "critical" those townships in the control area in which the annual decline of the ground water table exceeds a fixed percentage; appellants' Nebraska tract is located within a critical township. The rules and regulations require the installation of flow meters on every well within the control area, specify the amount of water per acre that may be used for irrigation, and set the spacing that is required between wells. They also strictly limit the intrastate transfer of ground water: transfers are only permitted between lands controlled by the same groundwater user, and all transfers must be approved by the district board of directors. *Id.*, at 68-69.

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[16] See *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, 188 (1950) ("Insofar as conservation is concerned, the national interest and the interest of producing states may well tend to coincide.").

The State's interest in conservation and preservation of ground water is advanced by the first three conditions in § 46-613.01 for the withdrawal of water for an interstate transfer. Those requirements are "that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare." Although Commerce Clause concerns are implicated by the fact that § 46-613.01 applies to interstate transfers but not to intrastate transfers, there are legitimate reasons for the special treatment accorded requests to transport ground water across state lines. Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State. An exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation. At least in the area in which appellants' Nebraska tract is located, the first three standards of §46-613.01 may well be no more strict in application than the limitations upon intrastate transfers imposed by the Upper Republican Natural Resources District.

Moreover, in the absence of a contrary view expressed by Congress, we are reluctant to condemn as unreasonable measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage. Our reluctance stems from the "confluence of [several] realities." *Hicklin* v. *Orbeck*, 437 U. S. 518, 534 (1978). First, a State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens—and not simply the health of its economy—is at the core of its police power. For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other. See *H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 525, 533 (1949). Second, the legal expectation that under cetain circumstances each State may restrict water within its borders has been fostered over the years not only by our equitable apportionment decrees, see, *e. g.*, *Wyoming* v. *Colorado*, 353 U. S. 953 (1957), but also by the negotiation and enforcement of interstate compacts. Our law therefore has recognized the relevance of state boundaries in the allocation of scarce water resources. Third, although appellee's claim to public ownership of Nebraska ground water cannot justify a total denial of federal regulatory power, it may support a limited preference for its own citizens in the utilization of the resource. See *Hicklin* v. *Orbeck*, *supra*, at 533-534. In this regard, it is relevant that appellee's claim is logically more substantial than claims to public ownership of other natural resources. See *supra*, at 7-9. Finally, given appellee's conservation efforts, the continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage. See *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980); cf. *Philadelphia* v. *New Jersey*, *supra*, at 627–628 and n. 6; *Baldwin* v. *Fish and Game Comm'n*, *supra*. A facial examination of the first three conditions set forth in § 46–613.01 does not, therefore, indicate that they impermissibly burden interstate commerce. Appellants, indeed, seem to concede their reasonableness.

Appellants, however, do challenge the requirement that "the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska"—the reciprocity provision that troubled the Chief Justice of the Nebraska Supreme Court. Because Colorado forbids the exportation of its ground water,[17] the reciprocity provision operates as an explicit barrier to commerce between the two States. The State therefore bears the initial burden of demonstrating a close fit between the reciprocity requirement and its asserted local purpose. *Hughes* v. *Oklahoma*, *supra*, at 336; *Dean Milk Co.* v. *City of Madison*, 340 U. S. 349, 354 (1951).

The reciprocity requirement fails to clear this initial hurdle. For there is no evidence that this restriction is narrowly tailored to the conservation and preservation rationale. Even though the supply of water in a particular well may be abundant, or perhaps even excessive, and even though the most beneficial use of that water might be in another State, such water may not be shipped into a neighboring State that does not permit its water to be used in Nebraska. If it could be shown that the State as a whole suffers a water shortage, that the intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining States would roughly compensate for any exportation to those States, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision. A demonstrably arid state conceivably might be able to marshall evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water. Appellee, however, does not claim that such evidence exists. We therefore are not persuaded that the reciprocity requirement—when superimposed on the first three restrictions in the statute—significantly advances the State's legitimate conservation and preservation interest; it surely is not narrowly tailored to serve that purpose. The reciprocity requirement does not survive the "strictest scrutiny" reserved for facially discriminatory legislation. *Hughes* v. *Oklahoma*, *supra*, at 337.[18]

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[17] Colo. Rev. Stat. § 37–90–136 provides as follows:

"For the purpose of aiding and preserving unto the state of Colorado and all its citizens the use of all ground waters of this state, whether tributary or nontributary to a natural stream, which waters are necessary for the health and prosperity of all the citizens of the state of Colorado, and for the growth, maintenance, and general welfare of the state, it is unlawful for any person to divert, carry, or transport by ditches, canals, pipelines, conduits, or any other manner any of the ground waters of this state, as said waters are in this section defined, into any other state for use therein."

III

Appellee's suggestion that Congress has authorized the States to impose otherwise impermissible burdens on interstate commerce in ground water is not well-founded. The suggestion is based on 37 statutes in which Congress has deferred to state water law, and on a number of interstate compacts dealing with water that have been approved by Congress.

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[18] The reciprocity requirement cannot, of course, be justified as a response to another State's unreasonable burden on commerce. *A & P Tea Co.* v. *Cottrell*, 424 U. S. 366, 379-381 (1976).

Abstracts of the relevant sections of the 37 statutes relied upon by appellee were submitted in connection with the Hearings on S. 1275 before the Senate Subcommittee on Irrigation and Reclamation, 88th Cong., 2d Sess., 302–310 (1964). Appellee refers the Court to that submission but only discusses §8 of the Reclamation Act of 1902, 32 Stat. 390. That section, it turns out, is typical of the other 36 statutes. It contains two parts. The first provides that "nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation." Such language defines the extent of the federal legislation's preemptive effect on state law. *New England Power Co.* v. *New Hampshire*, —— U. S. ——, —— (1982); *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 49 (1980). The second part provides that "the Secretary of Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws." Such language mandates that questions of water rights that arise in relation to a federal project are to be determined in accordance with state law. See *California* v. *United States*, 438 U. S. 645 (1978).

The interstate compacts to which appellee refers are agreements among States regarding rights to surface water. See The Council of State Governments, Interstate Compacts and Agencies 25–29, 31–32 (1979). Appellee emphasizes a compact between Nebraska and Colorado involving water rights to the South Platte River, see 44 Stat. 195 (1926), and a compact among Nebraska, Colorado, and Kansas involving water rights to the Republican River, see 57 Stat. 86 (1943).

Although the 37 statutes and the interstate compacts demonstrate Congress' deference to state water law,[19] they do not indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred. Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement,[20] constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. In the instances in which we have found such consent, Congress' "'intent and policy' to sustain state legislation from attack under the Commerce Clause" was "'expressly stated.'" *New England Power Co.* v. *New Hampshire*, *supra*, at —— (quoting *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 427 (1946)).[21] Cf. *Merrion* v. *Jicarilla Apache Tribe*, —— U. S. ——, ——, n. 21 (1982).

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[19] "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful

The reciprocity requirement of Neb. Rev. Stat. § 46-613.01 violates the Commerce Clause. We leave to the state courts the question whether the invalid portion is severable. The judgment of the Nebraska Supreme Court is reversed and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

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and continued deference to state water law by Congress." *California* v. *United States*, *supra*, at 653.

[20] Similarly, this Court has encouraged States to resolve their water disputes through interstate compacts rather than by equitable apportionment adjudication. See *Colorado* v. *Kansas*, 320 U. S. 383, 392 (1943).

[21] See, *e. g.*, *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408 (1946) (McCarran Act, 59 Stat. 33 (1945)); *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945) (§ 1606(a) of the Internal Revenue Code, 53 Stat. 1391 (1939)); *Whitfield* v. *Ohio*, 297 U. S. 431 (1936) (Hawes-Cooper Act, 45 Stat. 1084 (1929)); *In re Rahrer*, 140 U. S. 545 (1891) (Wilson Act, 26 Stat. 313 (1890)).

SUPREME COURT OF THE UNITED STATES

No. 81-613

JOY SPORHASE AND DELMER MOSS, ETC., APPELLANTS *v.* NEBRASKA, EX REL., PAUL L. DOUGLAS, ATTORNEY GENERAL

APPEAL FROM THE SUPREME COURT OF NEBRASKA

[July 2, 1982]

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, dissenting.

The issue presented by this case, and the only issue, is whether the existence of the Commerce Clause of the United States Constitution by itself, in the absence of any action by Congress, invalidates some or all of § 46-613.01 of the Nebraska Revised Statutes, which relates to groundwater. But instead of confining its opinion to this question, the Court first quite gratuitously undertakes to answer the question of whether the authority of Congress to regulate interstate commerce, conferred by the same provision of the Constitution, would enable it to legislate with respect to groundwater overdraft in some or all of the States.

That these two questions are quite distinct leaves no room for doubt. Congress may regulate not only the stream of commerce itself, but activities which affect interstate commerce, including wholly intrastate activities. See, *e. g.*, *Kirschbaum Co.* v. *Walling*, 316 U. S. 517 (1942); *United States* v. *Darby*, 312 U. S. 100 (1941); *Houston & Texas Ry.* v. *United States*, 234 U. S. 342 (1914). The activity upon which the regulatory effect of the congressional statute falls in many of these cases does not directly involve articles of commerce at all. For example, in *Kirschbaum*, the employees were engaged in the operation and maintenance of a loft building in which large quantities of goods for interstate commerce were produced; no one contended that these employees themselves, or the work which they actually performed, dealt with articles of commerce. Nonetheless, the provisions of the Fair Labor Standards Act were applied to them because Congress extended the terms of the Act not only to those who were "engaged in commerce" but to those who were engaged "in the production of goods for commerce." *Id.*, at 522.

Thus, the authority of Congress under the power to regulate interstate commerce may reach a good deal further than the mere negative impact of the Commerce Clause in the absence of any action by Congress. Upon a showing that groundwater overdraft has a substantial economic effect on interstate commerce, for example, Congress arguably could regulate groundwater overdraft, even if groundwater is not an "article of commerce" itself. See, *e. g.*, *Hodel* v. *Virginia Surface Mining & Recl. Assn.*, 452 U. S. 264, 281–283 (1981); *id.*, at 310–313 (REHNQUIST, J., concurring in judgment); *Wickard* v. *Filburn*, 317 U. S. 111 (1942). It is therefore wholly unnecessary to decide whether Congress could regulate groundwater overdraft in order to decide this case; since Congress has not undertaken such a regulation, I would leave the determination of its validity until such time as it is necessary to decide that question.

The question actually involved in this case is whether Neb. Rev. Stat. § 46–613.01 runs afoul of the unexercised authority of Congress to regulate interstate commerce. While the Court apparently agrees that our equitable apportionment decrees in cases such as *Wyoming* v. *Colorado*, 353 U. S. 953 (1957), and the execution and approval of interstate compacts apportioning water have given rise to "the legal expectation that under certain circumstances each State may restrict water within its borders," *ante*, at 14, it insists on an elaborate balancing process in which the State's "interest" is weighed under traditional Commerce Clause analysis.

I think that in more than one of our cases in which a State has invoked our original jurisdiction, the unsoundness of the Court's approach is manifest. For example, in *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237 (1907), the Court said:

> "This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."

Five years earlier, in *Kansas* v. *Colorado*, 185 U. S. 125, 142, 145–146 (1902), the Court had made clear that a State's quasi-sovereign interest in the flow of surface and subterranean water within its borders was of the same magnitude as its interest in pure air or healthy forests.

In my view, these cases appropriately recognize the traditional authority of a State over resources within its boundaries which are essential not only to the well-being, but often to the very lives of its citizens. In the exercise of this authority, a State may so regulate a natural resource so as to preclude that resource from attaining the status of an "article of commerce" for the purposes of the negative impact of the Commerce Clause. It is difficult, if not impossible, to conclude that "commerce" exists in an item that cannot be reduced to possession under state law and in which the State recognizes only a usufructuary right. "Commerce" cannot exist in a natural resource that cannot be sold, rented, traded, or transferred, but only *used.*

Of course, a State may not discriminate against interstate commerce when it regulates even such a resource. If the State allows indiscriminate intrastate commercial dealings in a particular resource, it may have a difficult task proving that an outright prohibition on interstate commercial dealings is not such a discrimination. I had thought that this was the basis for this Court's decisions in *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979), *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), and *West* v. *Kansas Nat. Gas Co.*, 221 U. S. 229 (1911). In each case, the State permitted a natural resource to be reduced to private possession, permitted an *intrastate* market to exist in that resource, and either barred *interstate* commerce entirely or granted its residents a commercial preference.[1]

By contrast, Nebraska so regulates groundwater that it cannot be said that the State permits any "commerce," intrastate or interstate, to exist in this natural resource. As with almost all of the Western States, Nebraska does not recognize an absolute ownership interest in groundwater, but grants landowners only a right to *use groundwater on the land from which it has been extracted.* Moreover, the landowner's right to use groundwater is limited. Nebraska landowners may not extract groundwater "in excess of a reasonable and beneficial use upon the land in which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole." *Olson* v. *City of Wahoo*, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933). With the exception of municipal water systems, Nebraska forbids any transportation of groundwater off the land owned or controlled by the person who has appropriated the water from its subterrranean source. *State ex. rel. Douglas* v. *Sporhase,* 208 Neb. 703, 710, 305 N.W. 2d 614, 619 (1981). See App. 68–69.

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[1] Similarly, in *City of Altus* v. *Carr*, 255 F. Supp. 828 (W.D. Tex.), aff'd mem., 385 U. S. 35 (1966), Texas placed no restrictions upon the use or the intrastate sale of groundwater. The "rule in Texas was that an owner of land could use all of the percolating water he could capture from the wells on his land for whatever beneficial purposes he needed it, on or off the land, and could likewise sell it to others for use on or off the land and outside the basin where produced, just as he could sell any other species of property." 255 F. Supp., at 833, n. 8. Texas' absolute ownership rule is an anomaly among the Western States. See 5 R. E. Clark, Waters and Water Rights § 441 (1972 & 1978 Supp.). In Nebraska, as in most of the Western States, groundwater is not treated as "any other species of property."

Nebraska places additional restrictions on groundwater users within certain areas, such as the portion of appellant's land situated in Nebraska, where the shortage of groundwater is determined to be critical. Water users in appellants' district are permitted only to irrigate the acreage irrigated in 1977, or the average number of acres irrigated between 1972 and 1976, whichever is greater, and must obtain permission from the water district's board before any additional acreage may be placed under irrigation. The amount of groundwater that may be extracted is strictly limited on an acre-inch-per-irrigated acre basis. There are also detailed regulations as to the spacing of wells and the use and operation of flow meters. App. 71–82.

Since Nebraska recognizes only a limited right to use groundwater on land owned by the appropriator, it cannot be said that "commerce" in groundwater exists as far as Nebraska is concerned. Therefore, it cannot be said that Neb. Rev. Stat. § 46–613.01 either discriminates against, or "burdens," interstate commerce. Section 46–613.01 is simply a regulation of the landowner's *right to use* groundwater extracted from lands he owns within Nebraska.[2] Unlike the

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[2] Unlike several other Western States, Nebraska does not entirely forbid groundwater extracted in Nebraska to be used in other States. See Brief for the City of El Paso as *Amicus Curiae* 2, n. 3. As noted by the Court, Nebraska merely places conditions on such a use of the State's groundwater. A permit must be obtained from the Nebraska Department of Water Resources. If the requested withdrawal of groundwater is determined to be "reasonable, not contrary to the conservation and use of ground water, and . . . not otherwise detrimental to the public welfare," a permit will be issued so long as the "state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that

Court, I cannot agree that Nebraska's limitation upon a landowner's right to extract water from his land situated in Nebraska *for his own use* on land he owns in an adjoining State runs afoul of Congress' unexercised authority to regulate interstate commerce.[3]

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state for use in the State of Nebraska." Id. § 46-613.01.

[3] The Court today invalidates only the reciprocity provision in § 46-613.01. *Ante*, at 15-16. Appellants, however, have never applied for the permit required by the Nebraska statute. I see nothing in the Court's opinion that would preclude the Nebraska Department of Water Resources from prohibiting appellants from transporting groundwater into the Colorado portion of their land until they obtain the permit required by the statute. I also see nothing in the Court's opinion that would preclude the Department of Water Resources from denying appellants a permit because of a failure to satisfy the remaining conditions in the statute.

Calendar No. 765

97TH CONGRESS } SENATE { REPORT
2d Session } { No. 97-528

COAL DISTRIBUTION AND UTILIZATION ACT OF 1982

AUGUST 17, 1982.—Ordered to be printed

Mr. MCCLURE, from the Committee on Energy and Natural Resources, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 1844]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 1844) to facilitate the national distribution and utilization of coal having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

* * * * * * *

Section 5 of the Committee amendment, entitled "Primacy of State Water Law", is the companion section for section 6 in the introduced legislation, which dealt with the preservation of State water law. Section 5 establishes the absolute primacy of the State water law not only for coal slurry pipelines which have applied for or have been determined to be in the natitonal interest under section 4, but also for all other interstate coal slurry pipelines.

The Committee amendment also includes a new section 7, entitled "Application of State and Local Law" dealing with State and local laws other than State water law. It is particularly noteworthy that this new section constitutes a savings clause for all State and local laws pertaining to the location, construction, operation or maintenance of a coal slurry pipeline, thus preserving such laws from any implication of preemption, but makes the applicability of those laws conditional on an exception where such applicability would have the effect of prohhibiting actitvities related to the pipeline. By comparison, section 5 and related provisions of the bill do not contain any conditions on the primacy of State water law.

The Committee's action in adopting the amendment in the nature of a substitute, as described in the preceding paragraphs, reflects the essential nature of the compromise struck by the Committee in its consideration of Federal assistance for "national interest" pipelines. In effect, the Committee has reported substitute legislation which has two purposes: (1) access to Federal eminent domain powers for "national interest" pipelines; and (2) the absolute primacy of State water law applicable to all interstate coal pipeline distribution systems. This duality of purpose reflects the Committee's conclusion that the limited Federal assistance for certain coal slurry pipelines (i.e., access to Federal eminent domain powers) should only be provided in Federal legislation which also establishes beyond question the greater national interest in the primacy of State water law. The Federal purpose, then, expressed in the reported Committee amendment, incorporates these different inextricably linked purposes without which the bill could not and would not have been favorably reported. Stated another way, the Committee intends that the eminent domain provisions of this Act be narrowly construed. The Committee does not intend these provisions to be construed as an "intention of Congress to secure a comprehensive development of national resources . . ." as was found in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152 (1946). There is no intent to generally legislate in this field, but rather, the intent is to grant a well-defined and specifically limited authority for the potential use of the power of eminent domain by private parties constructing coal slurry pipelines subject to the primacy of State water law. By contrast, the provisions related to State water law are expressly intended by the Committee to be a broad delegation of power, and to be so construed. The Committee recognizes that this policy may result in a nonuniform set of laws governing the availability or use of water in coal slurry pipelines, but concludes that the greater national interest resides in protecting and maintaining the primacy of State water law, including interstate compacts regarding the allocation of water.

The Committee adopted this policy after receiving expert testimony on both water and Constitutional law. It conducted a careful review and analsyis of both longstanding Congressional policy regarding the sanctity of State water law, and the judicial interpretations of relevant State and Federal statutes, including the most recent decisions by the U.S. Supreme Court in *New England Power Co.* v. *New Hampshire* —— U.S. ——, 102 S.Ct. 1096, 17 L.Ed.2d 188 (1982) and *Sporhase* v. *Nebraska* 50 U.S.L.W. 5115 (July 2, 1982).

Beginning with the Act of July 26, 1866 (14 Stat. 251), Congress expressly confirmed water rights acquired in accordance with State law in numerous statutes which have been the subject of equally numerous judicial interpretations. Generaly, in examining the validity of a particular State law or action against a particular Federal statute including water provisions, the Courts have sought to define the extent to which Congress has clearly expressed the realtionship of the provisions to powers under the Commerce Clause (Article I, § 8, Clause 3 of the U.S. Constitution), the Supremacy Clause (Article VI, Clause 2 of the U.S. Constitution), and the intended purpose of the statute as a whole.

Under the Commerce Clause of the Constitution, Congress has plenary power to regulate interstate commerce. It is empowered to determine whether the interests of the nation are better served by uniform Federal regulation, or by nonuniform or more restrictive State control. Where the Constitution grants to Congress the power to legislate, it may discharge its legislative function by adopting State laws, present or prospective. *United States* v. *Sharpnack*, 355 U.S. 286 (1958); *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946). It may also remove the obstacles to State legislation which will permit the State itself to legislate directly on the subject. *Butte Ctiy Water Co.* v. *Baker*, 196 U.S. 119 (1905); *In re Rahrer*, 140 U.S. 545 (1891). Moreover, the United States Supreme Court has recently reconfirmed that Congress may "confer upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980). This is true notwithstanding the fact that the Commerce Clause contains an implied limitation on the power of the States to burden interstate commerce. *See Cooley* v. *Board of Wardens*, 53 U.S. 299 (1852). For, "if Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the Congressional authorization is rendered invulnerable to Commerce Clause challenge." *Western & Southern life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648, 652–3 (1981). Also see *New England Power Co.* v. *New Hampshire*, —— U.S. ——, 102 S.Ct. 17 L.Ed. 2d 188 (1982).

As Chief Justice Stone stated in *Southern Pacific Co.* v. *Arizona* (325 U.S. 761, 766–7 (1948),

> Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible, or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce. (Citations omitted)

More recently, in the *New England Power Co.* case, Chief Justice Berger pointed out in the unanimous opinion of the Court,

> It is indeed well settled that Congress may use its powers under the Commerce Clause to confer upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy. The dispositive question, however, is whether Congress in fact has authorized the States to impose restrictions of the sort at issue here. (Slip opinion, p. 8; citations omitted)

Moreover, in summarizing the history of Congressional enactments regarding State water law and judicial interpretations regarding State water law and judicial interpretations in *Sporhase*, Justice Stevens stated,

> Although the 37 statutes and the interstate compacts demonstrate Congress' deference to State water law, they do not indicate that Congress wished to remove Federal constitutional constraints on such State laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred. Neither the fact that Congress has chosen not to create a Federal water law to govern water rights involved in Federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. In the instances in which we have found such consent, Congress' "intent and policy to sustain State legislation from attack under the Commerce Clause" was "expressly stated". (Slip opinion, pp. 17–18; citations omitted)

The Committee intends that the language of the Committee amendment in Sections 2(a)(7), 2(a)(8), 2(a)(9), 2(b), 4(a)(1), 4(e)(2), 4(e)(3), and 5 constitutes a clear and "expressly stated" "intent and policy" as stated by Justice Stevens in *Sporhase*, giving the consent of Congress under the Commerce Clause, necessary to allow the states to regulate commerce through the application of State water laws to interstate coal pipeline distribution systems in a manner which could be otherwise impermissible. The Committee in the words of Chief Justice Burger in *New England Power Co.* "in fact has authorized the States to impose restrictions" on commerce. It is the unequivocal intent of this bill to establish the primacy of State water law by authorizing the States to impose restrictions on interstate coal slurry pipelines which conceivably might otherwise be argued unilateral impositions of unreasonable burdens on commerce absent this legislation and to sustain such "State legislation from attack under the Commerce Clause". If a State has granted the necessary water rights under State law for operations to begin for a "national interest" pipeline, or any other interstate pipeline, and then subsequent State action pursuant to applicable State law, alters, restricts, or terminates the operations of the pipeline, this legislation would ensure that such State action would be constitutionally valid. The fact that coal slurry operations in interstate commerce would have begun would not diminish the primacy or applicability of State water law to such a coal slurry pipeline. The continued application and primacy of State water law through any subsequent State action after construction and initial operation of the pipeline cannot be interpreted to be an unreasonable burden on interstate commerce. This legislation ensures that State water law shall control for the duration of the pipeline operations and shall not be subject to any preemption by application of the Commerce Clause.

In the *Sporhase* case, which concerned the application of a Nebraska statute banning the export of groundwater to another State unless that State has a law granting reciprocal rights to export water into Nebraska, the Court applied a traditional Commerce Clause analysis, involving a balancing between legitimate state interest and its burden on commerce. The Committee intends that the continued application and vitality of State water law applicable to interstate coal slurry pipelines shall not be dependent upon any such Constitutional analysis of the legitimacy of the interests the State is seeking to protect as related to the reasonableness of any burden on interstate commerce which may be imposed by State water law. The Committee has affirmatively considered such Constitutional questions, and by the provisions of the Committee amendment has expressly disposed of them in favor of State water law. In so doing, the Congress will have also, as discussed previously, concluded that existing as well as future State water law applicable to coal slurry pipelines shall come under the primacy provisions of this law. Consequently, new State water law statutes or amendments to existing statutes which are applicable to coal slurry pipelines, shall be considered to have such primacy under the legislation.

The Committee appreciates that some case law, such as *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission* 328 U.S. 152 (1946) has been argued to stand for the legal proposition that Congress has been unsuccessful in laws such as the Federal Power Act in preserving State water law through the statutory provision of savings clauses. The Congressional intent and primary legal theory here is diametrically opposed to any such arguments and analyses. Here, regardless of the body of scholarly legal opinion on the state of existing law in the general issue of State water law under the Constitution, Congress will have enacted pursuant to its Commerce Clause powers, Federal legislation to ensure an express and absolute protection and primacy of State water law for all interstate coal slurry pipelines, not merely a legislative "saving" of such laws.

An important element of the Committee amendment's approach to water law is the recognition and preservation of interstate compacts governing the appropriation, purchase, transfer, use or diversion of water. Interstate compacts historically has been the legal vehicle ratifying interstate agreements governing water allocation among several States with interests in a source of water. Such interstate compacts are unaffected by this legislation and are applicable as a part of State water law to all interstate coal slurry pipelines. The Committee intends that the legal sufficiency and primacy of any Congressionally approved interstate compacts now in existence or subsequently adopted will be unquestioned despite the enactment of this legislation. Therefore, any interstate coal slurry pipeline, whether determined to be in the national interest or not, will be subject to any applicable interstate compact governing water appropriation, purchase, transfer, use or diversion, and all such pipelines must be in conformance with such interstate compacts. The Committee believes that interstate compacts are appropriate vehicles for States to use to determine allocations of water among themselves, as well as to ensure that their respective water interests are protected during the construction and operation of any coal slurry pipeline affecting such interests. The Committee encourages the several States who have water availability interests in proposed coal slurry pipeline systems to consider the establishment of an interstate compact to ensure the protection of their interests, to the extent they have not already done so.

The Committee-reported amendment thus reflects the Committee's conclusions and intentions with regard to interstate coal slurry pipelines and the applicability of State water law. The Committee does not intend to imply that the scheme it has adopted here to establish the primacy of State water law is the only one which Congress might adopt to accomplish the same end. The Committee notes in that regard that the House Committee on Interior and Insular Affairs and the House Committee on Public Works and Transportation have reported companion legislation, H.R. 4230, with related provisions and a similar intent expressed in the respective committee reports H. Repts. 90-423, parts I and II).

Further, the Committee during its consideration of this legislation necessarily took notice of the general state of the law regarding State water law under the Constitution of the United States, whether or not interstate coal slurry pipelines were the direct subjects of Federal action under this legislation. The Committee's action in fashioning the several provisions related to State water law applicable to coal pipelines is not intended to be any general Congressional statement, expressed or implied, with regard to State water laws or their primacy in our federal Constitutional scheme of laws. The Committee has not, and does not, take a position on the validity of any individual State water law in any fact situation other then under this legislation. Further, the Committee expressly reserves its position and any subsequent opinion on the broader issues of State water law in existing law and on the conclusion it might reach with regard to the applicability of State water laws in other arguable interstate commerce situations. Any such positions and opinions of the Committee should not be inferred from the reported Committee amendment nor this discussion. Neither does the Committee intend to create any implication that Congress is expanding any Federal jurisdiction which may exist regarding water.

The Committee amendment also addresses the use of Federal reserved water in coal slurry pipelines in Sections 4(e)(3), 5(c)(3), and 5(d), which are patterned on Section 178 of the Energy Security Act, Public Law 96-294, 94 Stat. 611 (June 30, 1980). These sections make it clear that: (1) a coal slurry pipeline does not become a federal project by virtue of the eminent domain authority under section 4 for the purpose of applying for or assigning water rights; (2) the Act does not confer upon any non-federal entity the right to the waters of any stream or underground water resources; and (3) any water to which a federal right can be asserted may be used for coal slurry pipelines only if authorized pursuant to State substantive and procedural law. Clearly, the Committee does not intend to create any federal reserved water right by this Act. Moreover, any existing Federal water right must be authorized in conformance with and subject to State law.

* * * * * * *

Section 5—Primacy of State Water Law

Section 5(a) expressly prohibits any reservation, appropriation, purchase, transfer, use, diversion, dedication or claim to water within any State for *any* interstate coal pipeline unless it takes place pursuant to and in compliance with both the substantive and procedural law of that State relating to the control, appropriation, use, disposal, or distribution of water and the protection and enforcement of water rights. The Committee intends in his subsection, together with the remainder of the section, to clearly establish the primacy of State water law in relationship to all interstate coal pipelines, not just those receiving a grant of eminent domain under section 4. The Committee does not intend to create any implication regarding the primacy of State water law in other areas by its silence.

Reference in section 5(a) to "the substantive and procedural law of the State" relates to State water laws, regulations, and common law, as interpreted by each State's administrative and judicial bodies. This language is intended to mean the State where the diversion takes place, not where the water resource originates, unless they are one and the same. Nothing in this Act is intended to change the relative rights, if any, between States to shared water resources.

Section 5(b) contains a clear and express intent and policy of Congress, acting under its Commerce Clause powers, to delegate to the States the authority to regulate commerce in a manner which would otherwise not be permissible. The section declares that the establishment and exercise of terms or conditions on permits or authorization for the reservation, appropriation, use, or diversion of water for any interstate coal pipeline distribution system shall be determined pursuant to the law of the State which grants such permit or authorization, notwithstanding any transportation, use, or disposal of such water in interstate commerce. The States are authorized by virtue of this section to deny the acquisition or exercise of a water right and to impose restrictions on water use, including terms and conditions terminating use, on any interstate coal pipeline which may be unilateral impositions of otherwise unreasonable burdens on commerce. Such State law is intended to be insulated from attack under the Commerce Clause. The Committee intends this section to be construed broadly.

Section 5(c) provides that this Act shall not preempt any provision of State law or of an interstate compact governing the use of water, nor shall this Act preempt any State or Federal law or interstate compact dealing with water quality or disposal. The Committee does not intend to alter the share of water of any interstate water course or aquifer to which any State may be entitled or to which any State may be limited by law governing the allocation between states of the waters of interstate water courses or aquifers. Subsection (c) also states that this Act does not confer any ability to exercise any Federal water right, nor does it affect rights of any Indian or Indian tribe.

Section 5(d) prohibits any interstate coal pipepine from using water to which a Federal right can be asserted, unless such use is authorized pursuant to State law.

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[From the Washington Post]

Wheat Farmer Stuns the West With Water Suit

(By Dale Russakoff)

Holyoke, Colo., September 11.—He is a lifelong wheat farmer with an eighth-grade education. He files his legal documents in a cardboard fruit crate labeled "Pears Net Wt. 9 lbs." One of his lawyers is a self-described "country hick" and the other is fresh out of Creighton Law School in Omaha.

Yet Joy Sporhase, who says he is "proud to live in a country where you can go straight to the top," singlehandedly has shaken much of the West, upsetting the precarious legal system that guards the region's most precious resource: water.

All he wanted was to irrigate his Colorado corn and bean fields with water from his well just over the state line in Nebraska.

But nothing concerning water in the West is quite so simple. Sporhase stumbled onto a Nebraska law banning the shipment of underground water into Colorado. He fought it all the way to the Supreme Court. On July 2, he won.

Now *Sporhase* v. *Nebraska* has grown into something greater than one farmer's fight to irrigate his land. A dozen western states have laws similar to Nebraska's, and most of them are in jeopardy.

The laws are part of an intricate legal system that rations the West's water between farmers and industry, and between states. Where there is water, there is wealth. Therefore, this system has shaped the West, and anything that challenges the system threatens the region's economic order.

Some politicians and interest groups predict that the Sporhase case could set off a "water rush," allowing huge energy companies to reach across state lines and guzzle water needed by farmers, toppling agriculture as the region's No. 1 livelihood.

Others say the impact will be gradual at most, that *Sporhase* is only the first in a series of cases that could reshape the distribution of the West's water profoundly.

As they pore over the ruling, these people often wonder at the upheaval caused by one hard-headed farmer whose land happened to straddle a state line.

"Sometimes," said water rights attorney Paul Bloom, "the most absurdly localized circumstances produce cosmic law. That's what you learn in law school. It's called precedent."

That's where Joy Sporhase, 65, came in. (Joy traditionally is a man's name in the Sporhase family). He didn't even intend to buy the farm. He and his son-in-law and partner, Delmar Moss, went to a farm auction near here in 1972 planning to buy some cattle. The land also was up for sale, and the highest bidder had offered $145 an acre.

"I thought to myself, heck, if it ain't gonna bring any more than that, why not buy it?" the Sporhase recalled. He bid $146.

"Before we knew it, we'd bought a farm," he said. Word of the spur-of-the-moment purchase traveled fast to town, where Sporhase's wife, Gladys, was shopping. "Somebody said two crazy guys bought a farm, and I just knew it had to be them," she recalled.

The land covered 640 acres: 140 in Colorado and 500 in Nebraska, across the gravel road that is the state line at that point. It had a well, a fairly unremarkable contraption sitting 55 feet inside Nebraska. The former owner had written on his Nebraska well registration form that he intended to use the well to irrigate his land on both sides of the state line, and no one else questioned him about it.

The well was routinely assigned the number G-33893 on Jan. 18, 1971—a number and a date that since have become part of the history of American water law. "See that?" Sporhase said as he pulled the registration form out of his fruit crate, pointing to the rough, handprinted words.

Several years later, Sporhase and Moss built a $47,000 sprinkling system to dribble water from the Nebraska well on their Colorado corn and bean fields. They contend that they notified state officials of their plan and were not warned against it.

"We were minding our own business," Sporhase said, "and here comes our first letter in the mail." He pulled the 1976 letter from the state Department of Water Resources from the crate. It referred to the 1971 registration form and the plan to pipe water from well No. G-33893 into Colorado. The letter threatened legal action if Sporhase and Moss persisted. "State law prohibits such activity," it said.

"We couldn't see where in the heck it made any difference," Sporhase said. "We owned the land on both sides of the line. The water sure wasn't paying any attention to where the line was. When Delmar went to Korea and my son went to Vietnam, it didn't make any difference what state the boys were from, did it?"

By an accident of geography, Sporhase and Moss found themselves at the center of the West's water troubles. Their farm sits atop a rock formation known as the Ogallala aquifer, the largest underground water source in the country, which now is drying up at an alarming rate.

The aquifer, which traps water like a sponge, supplies water for 15 million acres of farmland from South Dakota to Texas. At the current rate of use, it will dry up within 40 years, according to one study.

The states that depend on the aquifer have written volumes of rules and laws to try to keep what water remains to themselves. Colorado bans the export of underground water. Nebraska outlaws piping water from the aquifer to any state that in turn bans piping it into Nebraska.

Sporhase applied to Colorado for a permit to drill a well on that side of the line, but was turned down because state officials said the aquifer was already overused in his area. This meant he would have to let his 140 Colorado acres go dry, devaluing the land from $168,000 to $56,400.

Instead, the two farmers defied the Nebraska warning and continued to irrigate their Colorado land. When Nebraska filed suit as promised, Sporhase went straight to his lawyer, Dick Dudden of nearby Ogallala, Neb.

Dudden still recalls the day his fiesty farmer-client stormed into the office and vowed: "If I have to take my case to the U.S. Supreme Court, I'm going to do it."

The state won its case in Chase County, Neb., and again, when the farmers appealed, in the Nebraska Supreme Court. On Sept. 5, 1981, the farmers were forced to shut down operation of their well.

Then the initiative shifted to Dudden, who describes himself as a "country hick lawyer." Dudden, who had never before tried to take a case to the high court, bought a primer, "The United States Supreme Court," to learn how to apply for a hearing.

He also consulted a Denver firm whose attorneys had experience in Supreme Court appeals. They suggested that the farmers base the appeal on a technicality: that underground water is an "article of commerce."

Dudden assigned Ed Steenburg, his newest employe who had just graduated from Creighton Law School in Omaha, to spend the next month drafting the application to the court.

It was Steenburg's first case, and he worked 16-hour days and seven-day weeks, with Dudden going over one draft after another until at last the job was done. The application was filed under Dudden's name since Steenburg hadn't yet practiced the required three years to take a case to the high court.

On Nov. 28, 1981, Dudden received a call from a small Colorado weekly, the Yuma Pioneer, asking for reaction to a wire service report that the Supreme Court had agreed to hear the case. He thought it was a mistake. Then came a call from the Denver Post, and he began to believe it. Ten days later a post card arrived from the Supreme Court saying: "Sporhase vs. Nebraska. Probable jurisdiction noted."

Officials in western and midwestern states and almost every interest group that uses their water reacted with alarm. Seventeen briefs were filed in opposition to the farmers, only one in favor.

WESTERN STATES FEAR A FLOOD OF WATER SUITS

The abstruse argument that water was an article of commerce was obviously an explosive one. Western states have treated water differently from every other natural resource because of its importance to life.

They have divided the region's rivers and streams among themselves through complex formulas, sanctioned by the Supreme Court and interstate compacts. They have further divided their own water supplies among farmers, businesses, towns, wildlife, forests and other "beneficial uses."

Now Sporhase was arguing that water was part of the interstate commerce system, subject to regulation from Washington.

The briefs filed against Sporhase give a glimpse of what was at stake. A group of farmers called it a potential vehicle for the energy industry to siphon off water needed for agriculture; environmentalists saw in it a threat to state conservation programs that protect wildlife and forests; railroad interests perceived a boost to interstate coal pipelines—projects that need thousands of gallons of water and that threaten to break the rail lines' hold on the coal transportation business.

The only brief filed on the Sporhase-Moss side came from El Paso, which wants to pipe water from nearby New Mexico to meet its development demands but faces a New Mexico law similar to Nebraska's.

While the West debated these sweeping issues, the two farmers anxiously waited.

The hearing was scheduled for March 30, a Tuesday, but the Sporhases and the Mosses, the Duddens and the Steenburgs arrived on the Friday before. Dudden's father flew in from Phoenix. His son came down from Pennsylvania State University. Sporhase's two granddaughters came along, as did some of his neighbors from Holyoke.

Joy Sporhase and his clan had never before been to Washington, and they spent the next three days on a nonstop tourist whirl. They took pictures of everything, later placing the snapshots in a brown leather scrapbook, which sits next to their Bible on the living room coffee table. At the front of the book is a picture of the Sporhases and their grandchildren standing on the front steps of the Supreme Court.

Joy Sporhase says he will never forget how he felt walking into the court's hearing room that morning. "It was the first time I ever had knots in my stomach and I'm not even scared of the devil," he said. "You just sat there and said to yourself: Here you are, clear at the top."

After the hearing, Sporhase and Moss went home to their farm to tend their fields of dryland wheat, the crop they substituted for irrigated corn and beans after their water was cut off. In the western states, officials and interest groups awaited the decision as if it was a verdict.

The July 2 ruling was not as broad as some opponents had feared, or as some supporters had hoped. The court did conclude that water is an article of interstate commerce, meaning Nebraska cannot ban its export to Colorado, throwing into doubt similar provisions in a dozen other states.

But the 7-to-2 ruling upheld the rest of Nebraska's water law, including the state's right to regulate water use to ensure conservation. The justices said a state still could ban water exports if the ban is "narrowly tailored" to the goal of conserving water.

For Joy Sporhase, that was plenty. But for most western state officials it was too much.

"Ouch!" was the reaction of Nebraska Gov. Charles Thone. Officials predicted a flood of spinoff lawsuits, one for each time a state denies water exports in the name of conservation. The conservation programs in some states are so sketchy that officials said they will have trouble defending export bans even if they are justified.

About a dozen legislatures now are considering new or amended water laws, and some environmentalists have predicted optimistically that the ruling could lead to more sophisticated conservation programs throughout the region.

The anxiety comes in part from what David Aiken, a water law specialist at the University of Nebraska, calls the specter of "a full social and political transformation." If water is part of interstate commerce, several officials asked, will it eventually be put on the market for the highest bidder? How can farmers compete with oil companies? Will farmland eventually go out of production?

"For every water right sold to an energy company, the agricultural base is reduced, the political influence of farmers declines," Aiken said.

Attorneys or the energy industry said they see no dramatic transformation from *Sporhase*, although several said the case fits into the pattern of changes reshaping the West.

Edward W. Clyde of Salt Lake City, who has practiced water law for four decades, said the case improves the position of coal pipelines and other energy interests "only slightly," since a welter of other legal hurdles remain. He said he does not expect Congress to invoke the ruling to intervene in state water regulation.

Sporhase still hasn't received a permit to irrigate his Colorado acres. The court sent the case back to Nebraska with instructions to remove the export ban from the state's water law. Until that is done, state officials contend they cannot authorize Sporhase to pump water out of Nebraska. The farmer is considering a return trip to court.

On a recent day, Sporhase drove out to his well and parked his pickup on the state line. The sprinkler sat idle on the Colorado side, amid a field of dry wheat stubble. The well sat idle on the Nebraska side, overgrown with sunflowers and firebrush weeds.

Sporhase stood on the state line, leaned against his truck with the bumper sticker "Farmers Feed America. Do You?" and looked with pride and some consternation at his well.

"The day we stood up here at that auction and bid on this land," he said, "who ever would've thought we'd get into all this?"

INTERSTATE CONFERENCE
ICWP
ON WATER PROBLEMS

November 12, 1982

The Honorable James Abdnor, Chairman
Subcommittee on Water Resources
Senate Committee on Environment and
Public Works
4204 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Abdnor:

On November 4 and 5, the Board of Directors and the Goundwater Task Force of the Interstate Conference on Water Problems (ICWP) met to consider the implications of the recent U.S. Supreme Court decision, *Sporhase v. Nebraska*, regarding interstate transfers of groundwater. ICWP is concerned that the *Sporhase* decision, read in conjunction with previous Supreme Court holdings, raises disturbing questions as to the scope of a state's authority to control the export of groundwater from its territory. In the interest of fostering a thorough discussion of the issues presented in *Sporhase*, ICWP offers the enclosed analysis for the Subcommittee's consideration. We request that it be included as a statement for the record as part of the Subcommittee's September 15 hearing on *Sporhase v. Nebraska* and coal slurry legislation.

If ICWP may be of further assistance, please do not hesitate to call on us.

Sincerely,

Joan M. Kovalic

Joan M. Kovalic
Executive Director and
General Counsel

JMK:roc
Enclosure
cc: Senator Robert Stafford
Senator Jennings Randolph
Senator Daniel Moynihan
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INTERSTATE CONFERENCE
ICWP
ON WATER PROBLEMS

STATEMENT OF THE INTERSTATE CONFERENCE ON WATER PROBLEMS

Implications of

United States Supreme Court Decision in

Sporhase v. Nebraska

The Interstate Conference on Water Problesm (ICWP) welcomes the opportunity to comment on the possible implications of the recent decision in Sporhase v. Nebraska and commends the Water Resources Subcommittee of the Senate Environment and Public Works Committee for its interest in this matter.

The ICWP is a national association of State, intrastate, and interstate officials concerned with water administration, planning and related matters. The purpose of the ICWP is to facilitate cooperation, consultation, and the exchange of information concerning the conservation, use, development and administration of water and related land resources, the law governing these matters, and Federal-State relationships in the field of water.

Previous testimony to this Committee has downplayed the impact of the Sporhase decision, suggesting it be viewed narrowly and restricted to the unique factual situation presented in that case. While we certainly would prefer to view it in that light, a close reading of the Sporhase opinion, in conjunction with a review of previous Supreme Court holdings in commerce

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clause cases, raises distrubing questions regarding the scope of a State's authority to control the export of ground water from its territory. The true impact of the court's holding that ground water is an article of commerce will, of course, not be known until we have the benefit of subsequent decisions elaborating on the court's statements in Sporhase. However, we believe the Sporhase decision may place more significant restrictions on the power of States to control ground water use than was originally thought. In the interest of facilitating a thorough discussion of the issues presented in Sporhase, the ICWP offers the following analysis for the Committee's consideration.

After finding that ground water is an article of commerce, the court in Sporhase proceeded to evaluate the validity of Nebraska's of interstate transfer statute using the test employed in Pike v. Bruce Church, Inc.,397 U.S. 137, 142 (1970). This is the test that will be employed in future cases challenging the validity of State actions regulating interstate trasfers of ground water and it is quoted below.

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." (emphasis added).

This test raises numerous questions to occupy the talents of attorneys and water administrators. However, we limit our inquiry to only one of the questions raised. What will the court consider to be a "legitimate local public interest"? The purpose advanced by Nebraska to sustain its export statute in Sporhase was to "conserve and preserve" a diminishing resource. Justice Stevens responded by stating this was "unquestionably legitimate and highly important." This and other language in Sporhase has led many commentators to conclude that as long as export restrictions can be tied to this conservation and preservation rationale, the restrictions will be upheld. We are not so sure this will be sufficient. A brief look at another commerce clause case and a further reading of Sporhase will help explain our concern.

One of the more recent commerce clause cases decided by the Supreme Court is Hughes v. Oklahoma, 441 U.S. 322 (1978), a decision relied upon heavily by the court in Sporhase. This case involved a prohibtion by the State of Oklahoma of the export of naturally seined minnows from the State. This law was ruled unconstitutional a an impermissable burden on interstate commerce. In its opinion the court reviewed the purpose of the commerce clause, noting it was intended to prevent the economic Balkanization of the nation. The court went on to state that in matters of interstate commerce, there are no State boundaries. When dealing with matters of interstate commerce, the court stated,

> "a new power appears and a new welfare, a welfare that transcends that of any State .... constituted of the welfare of all the States, and that of each State is made the greater by a division of its resources, natural and created, with every other State .... This was the purpose, as it is the result, of the interstate commerce clause of the constitution of the United States." Hughes at 330.

This theme runs through out the Supreme Court's commerce clause cases and appears in a somewhat modified form in Sporhase. There the court states,

> "a state's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens - and not simply the health of its economy - is at the core of its police power. For commerce clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulations on the other." (emphasis supplied).

Our concern over this language stems from the fact that in most, if not all of the States having active ground water management programs, one of the primary purposes of their conservation and preservation efforts is to do precisely what the Supreme Court has said it will not permit. Protect the health of local economies based on irrigated agriculture.

Admittedly the language quoted from Sporhase is followed by statements that State borders will have some "relevance" in the allocation of scarce water resources and State claims of public ownership and State conservation efforts may be used to justify a limited preference for its own citizens in times of shortage. In this respect, the Sporhase decision may be viewed as departing somewhat from the "one economic unit" philosophy expressed in the court's previous decisions. Perhaps the Federal courts will treat ground water differently than other natural resources.

However, we believe it is unlikely the court will move very far from the view of the purpose of the commerce clause expressed in tis previous decisions. We believe the court's statements regarding the relevance of State boundaries and the authority of States to show a preference for their citizens are controlled or limited by the earlier statement that economic protectionism will not be allowed.

As stated earlier, we will have to wait for decisions in future litigation to reveal the true significance of the Sporhase decision. It would be premature to make recommendations for Congressional action until the limits of the State's authority over ground water exports are more clearly defined.

The Sporhase decision, and its possible progeny, raises serious issues regarding future water policies and management. As Congress has recognized and reiterated on numerous occasions, the States--rather than the Federal government--have lead responsibility and authority for defining and allocating water rights and for water resources planning, conservation and management. In judging the validity of State water laws and management decisions, the Courts and Congress should recognize the States have many legitimate concerns and interests. Valid State interests can and do include:

(1) Unifies management of water to protect watersheds, streams, aquifers, water uses and the environment;

(2) Developing and preserving adequate supplies to meet present and future needs;

(3) Establishing and administering water budgets for surface and ground waters;

(4) Determining and implementing water use priorities or preferences among competing uses for supplies;

(5) Conserving water and avoiding waste;

(6) Managing water as a replenishable resource; and,

(7) Protecting surface or ground water sources from contamination which precludes beneficial use.

Good water management is not protectionism, or an unreasonable burden on interstate commerce. Rather, ICWP recognizes that the States have a responsibility to address interstate water management issues. States should work together to develop common plans, policies and approaches to interstate management. River basin plans, compacts, and cooperative programs are far preferrable to Court litigation and intervention by Federal agencies, often relying on inadequate information and analysis. Rational water management in this nation will not arise from disputes over legal theories such as "interstate commerce." Good water policy and management must be built on adequate data, sound planing, thoughtful regulation, and continuing interstate cooperation.

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